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IN THE

Supreme Court of the United States

LOUISIANA SAFETY ASSOCIATION OF TIMBERMEN – SELF INSURERS FUND,

Petitioner,

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The McCarran-Ferguson Act provides that no "Act of Congress" shall preempt "any law enacted by any State for the purpose of regulating the business of insurance," unless the Act of Congress "specifically relates to the business of insurance." 15 U.S.C. § 1012(b), App. 140a. Chapter 2 of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 201-08, App. 141a-142a, which implements the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, does not specifically relate to the business of insurance. The question presented is:

Whether Chapter 2 of the FAA is an "Act of Congress" subject to the anti-preemption provision of the McCarran-Ferguson Act.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Petitioner is the Louisiana Safety Association of Timbermen – Self Insurers Fund (LSAT). LSAT is a self-insurance fund formed and licensed under the laws of Louisiana. It has no parent corporation, and no publicly-held company owns 10 percent or more of LSAT's stock. Respondents are Certain Underwriters at Lloyd's, London; and Safety National Casualty Corporation.

The parties listed above include all the parties to the proceeding in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

The McCarran-Ferguson Act provides that "[n]o Act of Congress" that does not "specifically relate[] to the business of insurance" shall be construed to preempt any State law enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b), App. 140a. In this case a divided Fifth Circuit, sitting *en banc*, held that Chapter 2 of the Federal Arbitration Act (FAA), which implements the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), is not an "Act of Congress" and therefore is not subject to the McCarran-Ferguson Act's anti-preemption provision. The Fifth Circuit acknowledged that its decision conflicts with the Second Circuit's decision in *Stephens v. American International Insurance Co.*, 66 F.3d 41 (2d Cir. 1995).

The Fifth Circuit's decision requires Louisiana policyholders to arbitrate disputes with foreign insurance companies, notwithstanding a Louisiana statute that invalidates arbitration agreements in insurance contracts. At least 16 States have enacted similar statutes. Certiorari is warranted to resolve the split in the circuits on an important and recurring issue. As the dissenting Fifth Circuit judges noted, "until [this Court] speak[s]," the conflicting lower court decisions "leave the state of the law in [Supremacy] Clause purgatory." App. 84a (quotation and citation omitted). Because this issue is almost always decided either in an unreviewable remand order or in a nonfinal order on arbitrability, this case presents a rare opportunity for the Court to

provide much-needed guidance to the lower courts on this important and recurring issue.

OPINIONS BELOW

The *en banc* opinion of the court of appeals (App. 1a-84a) is reported at 587 F.3d 714. The vacated panel opinion of the court of appeals (App. 85a-108a) is reported at 543 F.3d 744. The relevant orders of the district court (App. 109a-139a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2009. App. 2a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1292(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1012(b) of the McCarran-Ferguson Act, Title 15, United States Code, App. 140a, provides, in relevant part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance . . . .

The other relevant provisions of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201-208, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, and the Louisiana Revised

Statutes are reproduced in the Appendix. App. 140a-148a.

STATEMENT OF THE CASE

1. The McCarran-Ferguson Act. Congress enacted the McCarran-Ferguson Act in 1945 in response to this Court's decision in *United States v. South-Eastern Underwriters Association*, which held that the business of insurance is subject to federal regulation under the Commerce Clause. 322 U.S. 533, 552-53 (1944). The McCarran-Ferguson Act restored the "virtually exclusive [regulatory] domain" that the States traditionally had exercised over the insurance industry prior to *South-Eastern Underwriters*. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 538-39 (1978).

The McCarran-Ferguson Act commits the regulation of insurance to state law by providing that any State law enacted for the purpose of regulating insurance will trump, or "reverse preempt," any contrary federal law that does not relate specifically to insurance. 15 U.S.C. § 1012(b), App. 140a.

By establishing a federal policy of deferring to State regulation of insurance matters, the McCarran-Ferguson Act "overturn[s] the normal rules of preemption." *U.S. Dep't of the Treasury v. Fabe*, 508 U.S. 491, 507 (1993). To supersede a State law that was enacted for the purpose of regulating insurance, a federal law must contain a "clear statement" that it is meant to apply to the insurance business. *Id.*; *see also* 15 U.S.C. § 1011, App. 140a ("[S]ilence on the part of Congress shall not be construed to impose any barrier to the regulation . . . of such business by the several States."). The

McCarran-Ferguson Act thus protects state regulation "against inadvertent federal intrusion . . . through enactment of a federal statute that describes an affected activity in broad, general terms, of which the insurance business happens to constitute one part." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 39 (1996).

2. Louisiana's Insurance Arbitration Statute. Louisiana, like other States, has enacted a statute that prohibits the enforcement of arbitration clauses in the context of insurance disputes. Lousiana Revised Statute § 22:868 (formerly designated § 22:629) provides that "[n]o insurance contract delivered or issued for delivery in this state and covering subjects located, resident or to be performed in this state . . . , shall contain any condition, stipulation, or agreement" that "[d]eprive[s] the courts of this state of the jurisdiction of action against the insurer." La. Rev. Stat. § 22:868, App. 148a. The Fifth Circuit has recognized that arbitration clauses in insurance contracts are unenforceable under this provision. *See McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 120 F.3d 583, 586 (5th Cir. 1997).

3. Chapter 2 of the Federal Arbitration Act. In 1925, Congress enacted Chapter 1 of the FAA, which sets forth a federal policy favoring arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985). The FAA is a statute of general applicability; it contains no statement that it is meant to apply to the insurance business. As a result, federal courts consistently have held that, pursuant to the McCarran-Ferguson Act, state laws prohibiting enforcement of arbitration

clauses in insurance contracts are not preempted or otherwise impaired by Chapter 1 of the FAA.[1]

In 1970, Congress amended the FAA by adding Chapter 2, which implements the Convention. *See* Pub. L. No. 91-368, 84 Stat. 692. Article II of the Convention reflects the same policy in favor of arbitration as the original provisions of the FAA. It provides that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them," and that "[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration." Convention, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, art. II, App. 144a. Like Chapter 1 of the FAA, Chapter 2 is a statute of general applicability that contains no statement that it is meant to apply to the insurance business. App. 10a.

4. The Insurance Dispute. Petitioner Lousiana Safety Association of Timbermen – Self-Insurers Fund (LSAT) is a self-insurance fund that provides

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[1] *See, e.g.*, *Am. Bankers Ins. Co. v. Inman*, 436 F.3d 490, 494 (5th Cir. 2006) (addressing § 83-11-109 of the Mississippi Code); *McKnight v. Chicago Title Ins. Co.*, 358 F.3d 854, 859 (11th Cir. 2004) (per curiam) (addressing § 9-9-2(c) of the Georgia Code); *Standard Sec. Life Ins. Co. of New York v. West*, 267 F.3d 821, 823-24 (8th Cir. 2001) (addressing § 435.350 of the Missouri Statutes); *Mut. Reinsurance Bureau v. Great Plains Mut. Ins. Co.*, 969 F.2d 931, 934-35 (10th Cir. 1992) (addressing § 5-401 of the Kansas Statutes).

an approved statutory method by which its member employers may secure their workers' compensation obligations to injured workers under Louisiana law. App. 3a; *see* La. Rev. Stat. § 23:1195.A. Respondent Certain Underwriters at Lloyd's, London (Underwriters) provided excess insurance to LSAT for workers' compensation claims that exceeded the amount of LSAT's self-insurance retention. App. 3a. At least some of the specific excess policies contain arbitration provisions. *Id.* LSAT assigned its rights under those specific excess policies to Safety National Casualty Corporation (Safety National) in a loss portfolio transfer agreement. *Id.* The Underwriters refused to recognize that assignment. *Id.*

Safety National sued the Underwriters in federal district court seeking reimbursement for workers' compensation claims that exceeded the amount of LSAT's self-insurance retention. App. 122a. The Underwriters filed a motion to compel arbitration, which Safety National did not oppose. App. 123a. Later, the Underwriters sought to join LSAT as a party in the district court. *Id.* At the same time, LSAT moved to intervene in the action, and it moved to quash the arbitration. *Id.* LSAT argued that the arbitration clauses in the specific excess policies issued by the Underwriters are unenforceable because of Louisiana's insurance arbitration statute. *Id.*

5. The District Court's Order. The district court, rejecting a magistrate judge's recommendation, granted LSAT's motion to quash arbitration, finding that the arbitration provisions in the specific excess policies were unenforceable

pursuant to Louisiana law. App. 116a. The district court held that Lousiana's insurance arbitration statute regulates the business of insurance, and that because Chapter 2 of the FAA is an "Act of Congress," the Convention "must yield" to the Louisiana statute "by the plain language of the McCarran-Ferguson Act." *Id.*

In reaching this conclusion, the district court relied in part on the Second Circuit's decision in *Stephens v. American International Insurance Co.*, 66 F.3d 41 (2d Cir. 1995), which held that a Kentucky insurance arbitration statute takes precedence over the Convention pursuant to the McCarran-Ferguson Act. App. 117a. The district court concluded that when Congress enacted implementing legislation for the Convention in 1970, "it was aware of the existence of the McCarran-Ferguson Act." App. 118a. The court noted that "[i]f, in the interest of international comity, Congress [had] intended for the Convention to trump application of the McCarran-Ferguson Act, it would have so specified" in Chapter 2 of the FAA. *Id.*

Having noted in its decision that "the issue [wa]s a close one" (App. 117a), the district court later issued an order stating that it had "serious second thoughts" about its ruling on arbitrability (App. 112). After further briefing, the district court again concluded that the Louisiana insurance arbitration statute takes precedence over the Convention. App. 110a. The court then certified the question for interlocutory appeal, based on its conclusion that the ruling "involves a controlling question of law as to which there is substantial ground for difference of opinion." *Id.*

6. The Fifth Circuit Panel Opinion. The Fifth Circuit granted leave to appeal and a three-judge panel reversed the district court's decision, concluding that "Congress did not intend to include treaties" within the scope of McCarran-Ferguson. App. 92a. The panel assumed that the Convention was not self-executing, but concluded that "[i]mplementing legislation does not replace or displace a treaty," and "[a] treaty remains something more than an act of Congress." App. 96a.

The panel found it "unlikely that when Congress drafted the McCarran-Ferguson Act," it intended future treaties implemented by statute to be abrogated to the extent the treaty conflicted in some way with a state law regulating the business of insurance. App. 98a. The panel also pointed out that if a treaty were self-executing, it would not fall within the ambit of McCarran-Ferguson because it would not require an "Act of Congress" to be the basis for a rule of decision in United States courts. App. 99a. The panel said it could think of "no apparent reason" why Congress would have distinguished in the McCarran-Ferguson Act between treaties that are self-executing and treaties that are not self-executing. *Id.* The panel thus held that the McCarran-Ferguson Act does not cause the Louisiana insurance arbitration provision to preempt the Convention. App. 107a.

7. The Fifth Circuit *En Banc* Opinion.

a. The Majority Opinion. The Fifth Circuit granted *en banc* review and vacated the panel opinion. After further briefing and argument, a divided *en banc* court vacated the district court's

order, finding that the Convention supersedes the Louisiana statute. App. 2a-3a.

The majority described its task as "to determine if, in enacting the McCarran-Ferguson Act, Congress intended for state law to reverse-preempt federal law that has as its source an implemented non-self-executing treaty." App. 26a. It then engaged in a lengthy analysis of what Congress likely intended when it passed the McCarran-Ferguson Act in 1945. App. 15a-18a, 27a-30a.

The majority noted that the Underwriters did not challenge the district court's conclusion that the Louisiana statute regulates the business of insurance.[2] The court then assumed that the Convention is non-self-executing, but concluded that even if the Convention required implementing legislation to have effect in domestic courts, "that does not mean that Congress intended an 'Act of Congress,' as that phrase is used in the McCarran-Ferguson Act, to encompass a non-self-executing treaty that has been implemented with congressional legislation." App. 15a.

In attempting to discern Congress's intent, the majority could think of "no apparent reason" why, in enacting the McCarran-Ferguson Act, Congress would have passed a law that allowed non-self-executing treaties – but not self-executing treaties –

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[2] Courts of appeals consistently have held that State insurance anti-arbitration statutes regulate the business of insurance. *See, e.g., Am. Bankers Ins. Co.*, 436 F.3d at 494; *Standard Sec. Life Ins. Co.*, 267 F.3d at 823; *Mut. Reinsurance Bureau*, 969 F.2d at 933; *McKnight*, 358 F.3d at 858.

to be subject to the Act. App. 16a-17a. The court found support for its conclusion in the 1970 implementing legislation for the Convention, in which Congress said that "'[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws *and treaties* of the United States.'" App. 18a (quoting 9 U.S.C. § 203) (emphasis added) (setting forth federal court jurisdiction over actions falling under the Convention). The majority also noted that because the Convention's implementing legislation cannot "operate without reference to the contents of the Convention," it is the Convention, rather than its implementing legislation, that is being "construed" to supersede state law. App. 19a-22a.

Citing this Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the majority found its decision "bolstered" by the "national policy favoring arbitration." App. 30a-33a. The court concluded it could "discern no . . . deducible intent in the McCarran-Ferguson Act" to limit Congress's general pro-arbitration policy. App. 33a.

The court acknowledged that "[w]e are aware that our decision conflicts with that of the Second Circuit in *Stephens v. American International Insurance Co.*," which held that Kentucky's insurance arbitration insurance statute is not preempted by the Convention. App. 34a. The court criticized the Second Circuit for failing to "answer the question of what Congress *intended*" regarding the preemptive effect of treaties when it passed the McCarran-Ferguson Act. App. 35a (emphasis added).

b. Judge Clement's Concurrence. Judge Clement concurred on the ground that Article II of the Convention is self-executing, and therefore it needs no "Act of Congress" to provide a rule of decision in United States courts. App. 38a. She noted that Article II of the Convention says "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them," and she concluded that "[t]reaty provisions setting forth international obligations in such mandatory terms tilt strongly toward self-execution." App. 41a, 43a.

c. The Dissenting Opinion. Judge Elrod, joined by Judges Smith and Garza, dissented. They concluded that the majority, in what should have been "an exercise in garden-variety statutory interpretation," has "muddied the waters of our statutory interpretation jurisprudence, by reasoning on an ad hoc basis from its own conception of what is 'reasonable' or '[l]ikely' for Congress to have intended, rather than looking to what Congress said." App. 50a, 83a-84a.

The dissenters observed that the McCarran-Ferguson Act is "a clearly worded statute," and stated that they would follow the Second Circuit's unanimous decision in *Stephens* to hold that "[i]n a domestic court, a treaty that Congress enacts is not law itself[.] . . . [I]t is the statute that counts and the statute amounts to a standard congressional act" subject to preemption by state insurance statutes under the McCarran-Ferguson Act. App. 80a.

The dissenting judges reasoned that "[f]rom the perspective of the Supremacy Clause, [the Louisiana

statute] applies unless the Underwriters carry the burden to show that some specific federal law preempts it." App. 52a. "If the proposed preemptive law is a statute like the Convention Act, then the McCarran-Ferguson Act applies. If the proposed preemptive law is the Convention itself, then the court is correct that McCarran-Ferguson does not apply. But there is still no preemption – and the district court must be affirmed – unless the Convention is actually capable of superseding [the Louisiana statute] as a matter of Supremacy Clause law. It is not." App. 52a-53a.

Citing this Court's recent decision in *Medellin v. Texas*, the dissent emphasized that "only self-executing treaties operate by their own force to provide a rule of decision in the courts," while non-self-executing treaties "'can only be enforced pursuant to legislation to carry them into effect.'" App. 53a (quoting 128 S. Ct. 1346, 1356 (2008)). The dissent concluded that "as a source of law, the implementing legislation is the alpha and omega of what may constitute a rule of decision in U.S. courts." App. 57a.

In addition to Supreme Court precedent, the dissent noted that the majority opinion ignores scholarly consensus on the status of a non-self-executing treaty, as well as case law from other circuits. App. 59a-61a. Along with the Second Circuit's decision in *Stephens*, 66 F.3d 41, the dissent pointed to the Third Circuit's decision in *Suter v. Munich Reinsurance Co.*, which "faced essentially the same issue" and "framed the preemption issue in terms of whether there was a conflict between 'the Convention Act' and an allegedly contrary New

Jersey statute." App. 62a-63a (citing 223 F.3d 150, 152, 160-62 (3d Cir. 2000)).

The dissent also noted that "[t]he notion that non-self-executing treaties are inapplicable in domestic courts finds support in other circuits as well." App. 63a. It cited *Hopson v. Kreps*, a Ninth Circuit opinion concluding that "'the issue in any legal action concerning a statute implementing a treaty is the intended meaning of the terms of the statute.'" *Id.* (quoting 622 F.2d 1375, 1380 (9th Cir. 1980)). Further, when the D.C. Circuit addressed the interpretation of a non-self-executing treaty, Judge Kavanaugh noted in concurrence that "'[s]trictly, it is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States. That is true even when a non-self-executing agreement is 'enacted' by, or incorporated in, implementing legislation.'" App. 64a (quoting *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006) (Kavanaugh, J., concurring)).

The dissent concluded that because Chapter 2 of the FAA is an "Act of Congress," "the court's exercise in statutory interpretation should have ended with the plain language of the statute, and its foray into the realm of policy considerations is improper." App. 76a. The dissent believed the majority's "fruitless search for Congress's true intent" ultimately "supplant[s] the plain meaning of the unambiguous term 'Act of Congress' with a strained interpretation aimed at protecting important federal policies." *Id.* The dissent pointed out that "even if such policy considerations were relevant . . . , the court's analysis barely acknowledges the state interest that was significant enough to give rise to the rare anti-

preemption provision of the McCarran-Ferguson Act in the first place." App. 80a.

The dissent concluded by saying: "The court today has declined the opportunity to align itself with the Second Circuit and the Supreme Court's jurisprudence in this area. . . . As a result, at least until our superiors speak, we leave the state of the law in [Supremacy] Clause purgatory." App. 83a-84a (quotation and citation omitted).

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision creates a circuit split on an important issue of federal law. The conflicting decisions will cause insurance policyholders to be treated very differently depending upon where their case arises. Some policyholders will receive the protection of state laws that restrict the enforceability of arbitration clauses in insurance contracts. Other policyholders will be forced into arbitration with foreign (but not U.S.-based) insurance companies, often under procedures governed by foreign law and in overseas venues, despite state laws designed to protect insurance buyers by limiting the enforceability of arbitration clauses in insurance contracts.

The issue in this case arises frequently in the lower courts, but it is seldom subject to review on appeal. This case thus presents a rare opportunity for the Court to resolve an important and recurring issue of federal law.

A. The Fifth Circuit's Decision Directly Conflicts With A Decision of the Second Circuit.

As the Fifth Circuit acknowledged, its decision conflicts with the Second Circuit's decision in *Stephens*, 66 F.3d 41. App. 34a. In *Stephens*, the Second Circuit held that a Kentucky insurance arbitration statute takes precedence over Chapter 2 of the FAA pursuant to the McCarran-Ferguson Act. 66 F.3d at 43. The Second Circuit rejected the insurance company's argument that the Convention is not an "Act of Congress" and therefore is not subject to the McCarran-Ferguson Act. The court held that "[t]his argument fails because the Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation." *Id.* at 45. The court held that the Convention has effect as a matter of domestic law only through Chapter 2 of the FAA, which is an "Act of Congress" subject to the McCarran-Ferguson Act's anti-preemption provision. *Id.*; *see also Suter v. Munich Reinsurance Co.*, 223 F.3d 150, 152 (3d Cir. 2000) (framing preemption issue as whether there was a conflict between Convention's implementing legislation and an allegedly contrary New Jersey statute).

The Second Circuit's approach in *Stephens* is consistent with the analysis of other courts of appeals in cases involving non-self-executing treaty provisions and their implementing legislation. *See, e.g.*, *Hopson*, 622 F.2d at 1380 (concluding that "[t]he issue in any legal action concerning a statute implementing a treaty is the intended meaning of the terms of the statute"); *Fund for Animals, Inc.*, 472 F.3d at 879 (Kavanaugh, J., concurring)

("Strictly, it is the *implementing* legislation, rather than the agreement itself, that is given effect as law in the United States. That is true even when a non-self-executing agreement is enacted by, or incorporated in, implementing legislation.") (citation and internal punctuation omitted).

The Fifth Circuit took a very different approach in this case, defining its task as "to determine if, in enacting the McCarran-Ferguson Act, Congress intended for state law to reverse-preempt federal law that has as its source an implemented non-self-executing treaty." App. 26a. In concluding that a statute that implements a treaty is not an "Act of Congress," the Fifth Circuit criticized the Second Circuit's decision in *Stephens* for failing "[to] answer the question of what Congress *intended*" regarding the preemptive effect of treaties when it passed the McCarran-Ferguson Act. App. 35a (emphasis added).

In addition to creating a direct circuit split over the applicability of the McCarran-Ferguson Act's anti-preemption provision to Chapter 2 of the FAA, the Fifth Circuit's decision cannot be reconciled with the uniform federal authority holding that Chapter 1 of the FAA does not preempt state laws prohibiting enforcement of arbitration clauses in insurance contracts pursuant to the McCarran-Ferguson Act.[3]

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[3] *See, e.g.*, *Am. Bankers Ins. Co.*, 436 F.3d at 494 (addressing § 83-11-109 of the Mississippi Code); *McKnight*, 358 F.3d at 859 (addressing § 9-9-2(c) of the Georgia Code); *Standard Sec. Life Ins. Co.*, 267 F.3d at 823-24 (addressing § 435.350 of the Missouri Statutes); *Mut. Reinsurance Bureau*, 969 F.2d at 934-35 (addressing § 5-401 of the Kansas Statutes).

Thus, as a result of the court of appeals' decision in this case, U.S.-based insurers remain subject to State laws limiting the enforceability of arbitration clauses in insurance contracts, while foreign insurers can circumvent those laws in the Fifth Circuit (but not in the Second Circuit).

B. The Fifth Circuit's Decision Disregards Established Principles Of Statutory Interpretation.

This Court has stated repeatedly that "[t]he preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). Accordingly, a court's statutory interpretation inquiry should "begin[] with the statutory text, and end[] there as well if the text is unambiguous." *Id.*

This core principle of statutory interpretation applies with full force to preemption provisions. "If [a] statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which, necessarily contains the best evidence of Congress' pre-emptive intent." *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *see Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (in determining preemption question, the Court "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose") (citation and internal quotation marks omitted).

The McCarran-Ferguson Act provides, in pertinent part, that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b), App. 140a. As the Fifth Circuit majority acknowledged, a non-self-executing treaty has no effect in a domestic court "unless and until it is implemented by an act of Congress." App. 35a ("We agree, of course, that when provisions of a treaty are not self-executing, they cannot be enforced in a court in this country unless and until those provisions are implemented by Congress."). The federal law that provides the relevant rule of decision, therefore, is Chapter 2 of the FAA, not the Convention itself.[4]

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[4] Although the court of appeals said it would "assume" that the Convention was non-self-executing (App. 15a), there cannot be any plausible debate about that issue. In *Medellin v. Texas*, this Court expressly identified the Convention as an example of a non-self-executing treaty. *See* 128 S. Ct. 1346, 1366 (2008) (noting that "Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes," and citing the Convention as an example).

Moreover, it is clear that the Convention was not meant to "ha[ve] automatic domestic effect as federal law upon ratification." *Id.* at 1356 n.2. When President Johnson submitted the Convention to the Senate for ratification, he unambiguously stated that the United States would not deliver an instrument of accession until the entire Congress -- not just the Senate -- considered the Convention and passed a law through the traditional bicameral process incorporating the Convention's terms into the United States Code. *See* 114 Cong. Rec. S10488 (1968) (message of President Johnson) ("Changes in title 9 (arbitration) of the United States Code will be (...continued)

Chapter 2 of the FAA, which was required to give the Convention domestic effect, was passed by both houses of Congress just as any other federal statute is passed. It is therefore an "Act of Congress" within the meaning of the McCarran-Ferguson Act. As the dissent explained, because "no ambiguity on this point is cited by the court or by the parties," the majority's "exercise in statutory interpretation should have ended with the plain language of the statute" instead of embarking on a "foray into the realm of policy considerations." App. 75a-76a.

Rather than adhering to the plain language of the McCarran-Ferguson Act, the majority defined the task before it as "to determine if, in enacting the McCarran-Ferguson Act, Congress intended for state law to reverse-preempt federal law that has as its source an implemented non-self-executing treaty." App. 26a. The majority addressed this question by asking why the Congress that enacted the McCarran-Ferguson Act in 1945 would have wanted to distinguish between non-self-executing treaties

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required before the United States becomes a party to the convention. The United States instrument of accession to the convention will be executed *only after the necessary legislation is enacted.*") (emphasis added); *see also Medellin*, 128 S.Ct. at 1361 (President's view as to whether a treaty has immediate domestic effect or requires implementing legislation "is entitled to great weight") (citation and internal quotation marks omitted). Similarly, the Senate Report giving its advice and consent on the adoption of the treaty reiterates that "[c]hanges in the Federal Arbitration Act (title 9 of the United States Code) will be required *before the United States becomes a party to the convention.*" S. Exec. Rep. No. 90-10, at 2 (Sept. 27, 1968) (emphasis added).

(which would be subject to McCarran-Ferguson), and self-executing treaties (which would not). App. 16a. Because the majority could think of "no apparent reason" why Congress would have wanted to do so, it speculated that Congress must have intended to exclude "Acts of Congress" that implement treaties from the term "Acts of Congress" that it used in the McCarran-Ferguson Act's anti-preemption provision. App. 16a-17a.[5] The majority also believed that this interpretation furthered the federal policy favoring arbitration, even though this pro-arbitration policy does not apply to domestic insurers, on the basis that it could find "no . . . deducible intent in the McCarran-Ferguson Act" to overcome this pro-arbitration policy. App. 30a-33a.

By engaging in an avowedly extra-textual quest to discern the intent of the 1945 Congress, the majority disregarded the clearest evidence of congessional intent: the clear language of the McCarran-Ferguson Act. As the dissenting judges noted, the majority opinion "concludes that an Act of Congress is not really an Act of Congress." App. 50a; *see also* App. 76a (majority's "fruitless search for Congress's true intent" ultimately "supplants the plain meaning of the unambiguous term 'Act of Congress' with a strained interpretation aimed at protecting important federal policies"). The Fifth

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[5] On the other hand, the majority did not suggest any reason why the 1945 Congress would have intended to distinguish between U.S.-based insurance companies and foreign insurance companies in a way that allows foreign insurers doing business in Louisiana to escape state law limiting arbitration clauses in insurance contracts.

Circuit's decision is not only incorrect, but in conflict with this Court's prior decisions on statutory interpretation. *See BedRoc Ltd.*, 541 U.S. at 183; *CSX Transp., Inc.*, 507 U.S. at 664; *Morales*, 504 U.S. at 383. That conflict provides an additional reason to grant review in this case.

C. The Federal Issue Is Important.

The federal question presented in this case is extremely important. At least 13 states have enacted laws that prohibit enforcement of arbitration clauses in insurance disputes.[6] At least 3 other

[6] *See* Ark Code Ann. § 16-108-201(b) (arbitration provisions "shall have no application to . . . any insured or beneficiary under any insurance policy"); Ga. Code Ann. § 9-9-2(c)(3) (arbitration provisions "shall not apply" to "[a]ny contract of insurance"); Haw. Rev. Stat. § 431:10-221 (prohibiting insurance policies from "[d]epriving the courts of this State of the jurisdiction of actions against the insurer"); Kan. Stat. Ann. § 5-401(c) (provisions of arbitration act "shall not apply to . . . [c]ontracts of insurance"); Ky. Rev. Stat. Ann. § 417.050(2) (disputes under "insurance contracts" not arbitrable); La. Rev. Stat. Ann. § 22:868 ("[n]o insurance contract . . . shall contain any . . . agreement . . . [d]epriving the courts . . . of the jurisdiction of action against the insurer"); Mo. Ann. Stat. § 435.350 (arbitration provisions invalid for "contracts of insurance"); Neb. Rev. Stat. Ann. § 25-2602.01(f)(4) ("does not apply to . . . any agreement . . . relating to an insurance policy other than a contract between insurance companies including a reinsurance contract"); R.I. Stat. Ann. § 10-3-2 (allowing arbitration at the option of the insured); S.C. Code Ann. § 15-48-10(b)(4) ("shall not apply to . . . any insured or beneficiary under any insurance policy"); S.D. Codified Laws § 21-25A-3 (state arbitration statute "does not apply to insurance policies"); Va. Code Ann. § 38.2-312 (prohibiting any insurance policy from "[d]epriving the courts of this Commonwealth of jurisdiction in actions against the insurer"); Wash. Rev. Code § 48.18.200(1)(b) (prohibiting insurance policies from "[d]epriving the courts of this state of the jurisdiction of actions against the insurer").

states have enacted laws that prohibit or limit enforcement of arbitration clauses in certain types of insurance disputes.[7]

The Fifth Circuit's decision throws into doubt the validity of these state laws in all cases in which a policyholder contracts with a foreign insurance company. The invalidation of these state laws undermines the States' important interests – interests that the McCarran-Ferguson Act advances even at the expense of important federal interests. As this Court has noted, "[u]nder the terms of the McCarran-Ferguson Act, . . . federal law must yield to the extent the [state] statute furthers the interests of policyholders." *Fabe*, 508 U.S. at 502.

Statutes enacted by Louisiana and other States further the intersts of policyholders by preventing insurers from forcing their insureds into arbitration. *See McKnight*, 358 F.3d at 858; *Standard Sec. Life Ins. Co.* 267 F.3d at 824 (by introducing the possibility of jury verdicts into the equation, state insurance arbitration provisions are designed to affect the process for resolving disputed insurance claims). As a result of the court of appeals' holding, policyholders whose claims are not paid by foreign insurers under preprinted form policies will be

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[7] *See* Cal. Health & Safety Code § 1363.1 (requiring specific disclosure requirements before an arbitration clause in certain health insurance contracts may be enforced); Md. Insur. Admin. § 31.11.10.07 (prohibiting mandatory binding arbitration for disputes involving health insurance contracts); Miss. Code Ann. § 83-11-109 (prohibiting arbitration of uninsured motorist claims); 23 Wyo. Code R. § 9 (prohibiting mandatory arbitration of uninsured motorist claims).

compelled to arbitrate their disputes, potentially in distant locales with no meaningful connection to the underlying coverage dispute. This is precisely the type of result that the McCarran-Ferguson Act seeks to avoid by encouraging local regulation of the insurance business. *See Fabe*, 508 U.S. at 502.

That foreign insurance companies intend to force policyholders into arbitration to avoid subjecting their claims handling decisions to the judgment of juries is clear from the frequency with which arbitration clauses appear in insurance contracts. Many modern insurance contracts follow the "Bermuda Form," a preprinted insurance contract developed by major Bermuda-based insurance companies that emerged to provide liability insurance to U.S.-based policyholders in the mid-1980s during a period of contraction in insurance capacity in U.S. markets. *See* Richard Jacobs et al., *Liability Insurance in International Arbitration: The Bermuda Form* ix (2004). The Bermuda Form "is now of enormous importance commercially, in use not only by those for whom it was originally created, but by other insurers as well." *Id.* The Bermuda Form provides for arbitration of disputes in London, because "[t]he insurance companies were anxious to avoid United States courts which were perceived, rightly or wrongly, as too pro-policyholder." *Id.* § 3.02.[8] According to an article published last month:

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[8] Unlike the Bermuda Form, the specific excess policies in this case do not specify where disputes are to be arbitrated.

> Arbitration is certainly being used more frequently to resolve disputes in the insurance coverage arena. . . . From the policyholder perspective, this increase relates at least in part to insurers trying to avoid or minimize the impact of unfavorable legal precedent and contract interpretation principles that have been developed through court decisions that are not as favorable to insurers. Insurers may believe that such legal precedent is less likely to be strictly applied in arbitration proceedings that are less subject to appellate review.

Tyrone R. Childress, *The Use of Arbitration in Insurance Coverage Disputes: A Policyholder Perspective*, *in* Emerging Applications for ADR: Leading Lawyer on Utilizing Alternative Dispute Resolution in New Ways and Testing Innovative Approaches (Jan. 2010), *at* 2010 WL 384497; *see also* Susan Randall, *Mandatory Arbitration in Insurance Disputes: Inverse Preemption of the Federal Arbitration Act*, 11 Conn. Ins. L.J. 253, 253-54 (2004-2005) ("[A]rbitration provisions are appearing with increasing frequency in all types of insurance policies . . . . [C]oncern over the fairness of arbitration, especially in consumer contracts, is magnified in the insurance context.").

D. The Fifth Circuit's Decision Provides An Excellent Vehicle For This Court's Review.

This case provides an excellent vehicle for this Court to review the question decided by the court of

appeals. Because the question arises frequently in the lower courts but rarely makes its way to a court of appeals, let alone this Court, the opportunity for review of an important federal issue, based on fully-reasoned majority and dissenting opinions of an *en banc* court, is a rare opportunity for this Court to provide much-needed guidance to the lower courts.

The issue presented in this case arises frequently in district courts, where it has given rise to division and confusion. The district court in this case, after describing the question as a "close one," determined that the Louisiana statute should be enforced pursuant to McCarran-Ferguson, but admitted it was "vacillat[ing]" on the issue, and ultimately certified the question for an interlocutory appeal after requiring the parties to complete two rounds of briefing. App. 110a, 112a, 117a; *see also Murphy Oil USA, Inc. v. SR Int'l Bus. Ins. Co. Ltd.*, No. 07-cv-1071, 2007 WL 2752366, at *3 (W.D. Ark. 2007) (finding *Stephens* unpersuasive and holding that "the New York Convention must be enforced according to its terms over all prior inconsistent rules of law") (quotations and citation omitted); *PinnOak Res., LLC v. Certain Underwriters at Lloyd's, London*, 394 F. Supp. 2d 821, 828 (S.D. W. Va. 2005) (noting that "the decisions are split" on whether state laws can invalidate agreements to arbitrate with foreign insurers pursuant to McCarran-Ferguson and retaining jurisdiction because "[i]n view of this split of authority, this court concludes that [the] removal petition presents a substantial question of federal law"); *Transit Casualty Co. v. Certain Underwriters at Lloyd's of London*, No. 96-4173-cv-2, 1996 WL 938126, at *2 (W.D. Mo. 1996) (finding chapter 2 of

FAA does not preempt Missouri's insurance arbitration statute because "neither the Convention nor the Federal Arbitration Act specifically relate to the business of insurance"). This Court's review is warranted to resolve the continuing division and confusion over a recurring and important federal issue, involving the intersection between competing federal policies favoring arbitration clauses in commercial agreements and local state regulation of the business of insurance.

There are two ways in which the issue typically arises in the lower courts: (1) a foreign insurance company files a motion to compel arbitration, based on Chapter 2 of the FAA; or (2) a foreign insurance company removes a state court action to federal court based on Chapter 2 of the FAA. In both situations – and regardless of how the district court rules on the motion presenting the issue – the district court's ruling rarely is subject to appellate review.

This case presents an example of the first way that the anti-preemption issue arises. Safety National filed this case in federal court based on diversity jurisdiction, and the Underwriters filed a motion to compel arbitration. App. 123a. LSAT moved to quash the arbitration motion, arguing that the state law is subject to the McCarran-Ferguson Act's anti-preemption provision, and therefore is not invalidated by Chapter 2 of the FAA. *Id.* A court presented with these arbitrability motions will either decide that Chapter 2 of the FAA preempts the state law and stay the case while the parties submit to arbitration, or it will decide that Chapter 2 of the FAA does not preempt the state law and allow the

case to proceed in federal district court. Either way, the order is nonfinal, and cannot be appealed unless the district court certifies the question to the court of appeals and the court of appeals accepts certification. *See, e.g.*, 28 U.S.C. § 1292(b).

In this case, the district court decided that Chapter 2 of the FAA does not preempt the Louisiana insurance arbitration statute, and it was prepared to allow the case to proceed in federal court until it certified the issue for an interlocutory appeal based on its perception that it may have answered the question incorrectly. App. 110a, 117a. The district court in *Stephens* ruled the opposite way on the motion – it concluded that Chapter 2 of the FAA preempted Kentucky's insurance arbitration provision – and that case also made its way to the Second Circuit through certification of an interlocutory appeal. *See* 66 F.3d at 43 (district court granted insurer's motion to compel arbitration, and Second Circuit accepted interlocutory appeal under § 1292).

The second way this issue arises is through the federal courts' removal jurisdiction. A policyholder will file an insurance coverage lawsuit in state court, and the foreign insurance company defendant may remove the case to federal court, asserting that the dispute is subject to an arbitration provision that "falls under the Convention." *See* 9 U.S.C. § 205 ("Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant . . . may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States."). The

policyholder then raises the McCarran Ferguson Act issue in a motion to remand the case to state court for lack of federal jurisdiction.

If the district court finds that Chapter 2 of the FAA supersedes the contrary state law and federal question jurisdiction therefore exists, the ruling would again be nonfinal, and only subject to appeal through certification under § 1292(b). If the district court agrees that Chapter 2 of the FAA is subject to the McCarran-Ferguson Act's anti-preemption provision, it will issue an order remanding the case to state court for lack of federal jurisdiction. That order will be unreviewable pursuant to 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.").

This is precisely what happened in *Transit Casualty Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619 (8th Cir. 1997). The policyholder filed suit in state court, and the foreign insurance company removed the case to federal court and sought to compel arbitration. *See* 1996 WL 938126, at *1 (W.D. Mo. 1996). The policyholder moved to remand to state court based on Missouri's insurance arbitration statute, and the district court remanded the case, holding that "neither the Convention *nor* the Federal Arbitration Act specifically relate to the business of insurance." *Id.* at *2. When the foreign insurance company appealed that decision, the Eighth Circuit determined that under 28 U.S.C. § 1447(d), it had no jurisdiction to review the district court's order remanding the case for lack of jurisdiction. *Transit Cas. Co.*, 119 F.3d at 624.

Because the procedural posture in which this recurring issue arises rarely results in appellate review, this case presents an ideal vehicle for this Court to resolve the question presented. The district court, having found the question a "close one" (App. 117a), certified it for an interlocutory appeal (App. 110a). The Fifth Circuit accepted certification of the issue, subjected the panel's decision to *en banc* review, and published majority and dissenting opinions that thoroughly set forth both sides of the issue. The Court should grant the petition in order to resolve the split in the circuits on an important issue addressing the proper intersection between the McCarran-Ferguson Act and the Convention's implementing legislation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 5, 2010

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-30262

SAFETY NATIONAL CASUALTY CORPORATION,

Plaintiff-Appellee,

LOUISIANA SAFETY ASSOCIATION OF TIMBERMEN – SELF INSURERS FUND,

Intervenor Plaintiff-Appellee,

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON; ET AL.,

Defendants

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON,

Defendant-Appellant,

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON,

Plaintiff-Appellant,

v.

SAFETY NATIONAL CASUALTY CORPORATION; LOUSIANA SAFETY ASSOCIATION OF TIMBERMEN,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Lousiana

Filed November 9, 2009

Before: JONES, Chief Judge, and KING, JOLLY, DAVIS, SMITH, WIENER, BARKSDALE, GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS, CLEMENT, PRADO, OWEN, ELROD, SOUTHWICK and HAYNES, Circuit Judges.

OWEN, Circuit Judge, joined by EDITH H. JONES, Chief Judge, and KING, E. GRADY JOLLY, W. EUGENE DAVIS, WIENER, BARKSDALE, DeMOSS, BENAVIDES, CARL E. STEWART, DENNIS, PRADO, LESLIE H. SOUTHWICK and HAYNES, Circuit Judges:

The basis for this interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is the district court's denial of a motion to compel arbitration of a contractual dispute among three insurers. We consider en banc whether the McCarran-Ferguson Act[1] authorizes state law to reverse-preempt the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention)[2] or its implementing legislation

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[1] 15 U.S.C. §§ 1011-1015.

[2] June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

(Convention Act).[3] We conclude that it does not. We vacate the district court's order and remand for further proceedings.

I

Louisiana Safety Association of Timbermen-Self Insurers Fund (LSAT) is, as its name implies, a self-insurance fund operating in Louisiana. It provides workers' compensation insurance for its members. Certain Underwriters at Lloyd's, London (the Underwriters) provided excess insurance to LSAT by reinsuring claims for occupational-injury occurrences that exceeded the amount of LSAT's self-insurance retention. Each reinsurance agreement contained an arbitration provision.

Safety National Casualty Corporation (Safety National) also provides excess workers' compensation coverage and alleges that in a loss portfolio transfer agreement, LSAT assigned its rights under the reinsurance agreements with the Underwriters to Safety National. The Underwriters refused to recognize the assignment, contending that LSAT's obligations were strictly personal and therefore non-assignable.

Safety National sued the Underwriters in federal district court. The Underwriters filed an unopposed motion to stay proceedings and compel arbitration. The district court initially granted that motion.

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[3] Pub.L. No. 91-368, 84 Stat. 692 (1970) (codified at 9 U.S.C. §§ 201-208).

The Underwriters commenced arbitration proceedings with Safety National and LSAT; however, the parties could not agree upon how arbitrators were to be selected. The Underwriters then filed a motion to lift the stay in order to join LSAT as a party in the district court and to compel arbitration to resolve how to compose the arbitration panel. In response, LSAT moved to intervene, lift the stay, and quash arbitration. LSAT asserted that the arbitration agreements were unenforceable under Louisiana law.

While those motions were pending, the Underwriters filed a separate action against Safety National and LSAT seeking recovery of unpaid premiums under the policies. The district court consolidated the two actions.

The district court ultimately reconsidered its initial decision and granted LSAT's motion to quash arbitration. The district court concluded that although the Convention would otherwise require arbitration, a Louisiana statute[4] that has been interpreted to prohibit arbitration agreements in insurance contracts was controlling and reverse-preempted the Convention because of the McCarran-Ferguson Act.[5] The district court subsequently

[4] La. Rev. Stat. Ann. § 22:868 (previously La. Rev. Stat. Ann. § 22:629).

[5] *See generally U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 507 (1993) ("Ordinarily, a federal law supersedes any inconsistent state law. The first clause of [15 U.S.C. § 1012(b)] reverses this by imposing what is, in effect, a clear-statement rule, a rule that state laws enacted 'for the purpose of regulating the (continued...)

certified that the order embodying its rulings involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal pursuant to 28 U.S.C. § 1292(b) may materially advance the termination of the litigation. A panel of this court concluded that the McCarran-Ferguson Act did not cause the Louisiana statute under consideration to reverse-preempt the Convention or the Convention Act.[6] Rehearing en banc was granted, thereby vacating the panel opinion.[7] Because the McCarran-Ferguson Act does not apply to the Convention, we vacate the district court's order and remand for further proceedings consistent with this opinion.

II

The Underwriters raise three issues: whether (1) the Convention is an "Act of Congress" within the meaning of the McCarran-Ferguson Act,[8] (2) the McCarran-Ferguson Act applies to international commercial transactions, and (3) the Convention takes precedence over the McCarran-Ferguson Act even if the latter applies to international transactions. Because our resolution of the first

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(footnote continued)

business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise.").

[6] *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 543 F.3d 744 (5th Cir.2008), *vacated and reh'g en banc granted*, 558 F.3d 599 (5th Cir.2009).

[7] *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 558 F.3d 599 (5th Cir.2009).

[8] 15 U.S.C. § 1012(b).

issue resolves the question presented in this interlocutory appeal, we do not reach the other issues pressed by the Underwriters. We are persuaded that state law does not reverse-preempt federal law in the present case for two related but distinct reasons: (1) Congress did not intend to include a treaty within the scope of an "Act of Congress" when it used those words in the McCarran-Ferguson Act, and (2) in this case, it is when we construe a treaty-specifically, the Convention, rather than the Convention Act-to determine the parties' respective rights and obligations, that the state law at issue is superseded.

The starting point of our inquiry is the statutory and treaty texts.[9] Here, the texts of the Convention, the Convention Act, and the McCarran-Ferguson Act support the conclusion that the McCarran-Ferguson Act does not authorize Louisiana to reverse-preempt the Convention by means of contrary legislation prohibiting arbitration of disputes regarding contracts of insurance.

The Louisiana statute at issue provides:

> A. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state . . . shall

[9] *See Medellín v. Texas*, 552 U.S. 491 (2008) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text."); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself.").

> contain any condition, stipulation, or agreement:
>
> . . . .
>
> (2) Depriving the courts of this state of the jurisdiction of action against the insurer.
>
> . . . .
>
> C. Any such condition, stipulation, or agreement in violation of this Section shall be void, but such voiding shall not affect the validity of the other provisions of the contract.[10]

Although it is not clear from this provision's text that arbitration agreements are voided, Louisiana courts have held that such agreements are unenforceable because of this statute.[11]

The Louisiana statute, as so interpreted, conflicts with the United States's commitments under the

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[10] La. Rev. Stat. Ann. § 22:868.

[11] *See Doucet v. Dental Health Plans Mgmt. Corp.*, 412 So.2d 1383, 1384 (La. 1982) ("Classification of the contract at issue as an insurance contract renders the arbitration provisions of that contract unenforceable under [Louisiana Revised Statutes § 22:868]."); *see also McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 120 F.3d 583, 586 (5th Cir.1997) ("Compulsory arbitration clauses in certain insurance contracts are unenforceable in Louisiana because of [Louisiana Revised Statutes § 22:868] . . . ."); *accord W. of Eng. Ship Owners Mut. Ins. Ass'n (Luxembourg) v. Am. Marine Corp.*, 981 F.2d 749, 750 n. 5 (5th Cir.1993) ("Louisiana has prohibited arbitration clauses in insurance policies" (citing La. Rev. Stat. Ann. § 22:868; *Doucet*, 412 So.2d at 1384)).

Convention. The Convention states that each signatory nation "shall recognize an agreement in writing under which the parties undertake to submit to arbitration" their dispute "concerning a subject matter capable of settlement by arbitration."[12] The Convention contemplates enforcement in a signatory nation's courts, directing that courts "shall" compel arbitration when requested by a party to an international arbitration agreement, subject to certain exceptions not at issue in the present case:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.[13]

This treaty is the subject of the Convention Act. That Act states that the Convention "shall be enforced in United States courts in accordance with this chapter."[14] The Act additionally provides relevant definitions[15] and establishes federal court jurisdiction and venue.[16] The parties agree that

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[12] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(1), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

[13] *Id.* art. II(3).

[14] 9 U.S.C. § 201.

[15] *Id.* § 202.

[16] *Id.* § 203-04.

requiring arbitration of the present dispute in compliance with the Convention would contravene the Louisiana statute.

LSAT contends that the McCarran-Ferguson Act resolves this conflict in favor of the application of state law because the Louisiana statute regulates the business of insurance. The McCarran-Ferguson Act provides that "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."[17] The Act further provides, "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . ."[18] The McCarran-Ferguson Act thus allows state law to reverse-preempt an otherwise applicable federal statute because the McCarran-Ferguson Act does not permit an "Act of Congress" to be "construed to invalidate, impair, or supersede" state law unless the Act of Congress "specifically relates to the business of insurance."

[17] 15 U.S.C. § 1011.

[18] *Id.* § 1012(b); *U.S. Dept. of Treasury v. Fabe*, 508 U.S. 491, 507 (1993) (explaining that the first clause of [§ 1012(b)] mandates that state statutes "regulating the business of insurance" do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise).

For the purposes of the McCarran-Ferguson Act, neither the Convention nor the Convention Act specifically relates to the business of insurance. Nor do the Underwriters challenge the district court's conclusion that Louisiana Revised Statutes § 22:868, when applied to disputes arising under reinsurance agreements between insurers, regulates the business of insurance within the meaning of the McCarran-Ferguson Act.[19] Accordingly, we will assume, without deciding, that the Louisiana statute regulates the business of insurance,[20] although the matter is not entirely free from doubt.[21] We,

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[19] 15 U.S.C. § 1012(b).

[20] *See Fabe*, 508 U.S. at 505 ("The broad category of laws enacted 'for the purpose of regulating the business of insurance' consists of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance . . . . [T]he actual performance of an insurance contract is an essential part of the 'business of insurance.'") (citation omitted).

[21] One of the criteria for determining whether a law regulates the business of insurance is whether it has the effect of spreading or transferring a policyholder's risk. *See Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982) (explaining that the "three criteria relevant in determining whether a particular practice is part of the 'business of insurance'" include "whether the practice has the effect of transferring or spreading a policyholder's risk," although "[n]one of these three criteria is necessarily determinative in itself"); *cf. Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 338 (2003) (explaining, albeit in the context of ERISA, "that conditions on the right to engage in the business of insurance must also substantially affect the risk pooling arrangement between the insurer and the insured"). An argument could be made that, at least in theory, resolving claims in an arbitration rather than in a court or potentially before a jury does not substantially affect the risk pooling (continued...)

(footnote continued)

arrangement between the insurer and the insured. The Supreme Court has emphasized that arbitration agreements are forum-selection provisions and do not displace substantive rights afforded by a statute or other substantive law. *See, e.g.*, *Preston v. Ferrer*, 552 U.S. 346 (2008) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral . . . forum." (omission in original) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985))); *cf. Int'l Ins. Co. v. Duryee*, 96 F.3d 837, 839-40 (6th Cir.1996) (holding that a state statute revoking an insurer's license to do business if it exercised its right to remove a suit to federal court was not saved from preemption by the McCarran-Ferguson Act because the state statute "was not enacted so much 'for the purpose of regulating the business of insurance' as for the parochial purpose of regulating a foreign insurer's choice of forum and punishing the insurer for going into federal court"). However, in emphasizing that arbitration agreements generally should be enforced to preserve the parties' selection of the arbitral forum without regard to state laws mandating a judicial forum, the Supreme Court has said, "the [Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ('FAA')] not only 'declared a national policy favoring arbitration,' but actually 'withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.'" *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)).

It could also be argued that prohibiting the enforcement of arbitration agreements in contracts between an insurer and a reinsurer is not "necessary" to "protect policyholders," *see generally Garcia v. Island Program Designer, Inc.*, 4 F.3d 57, 62 (1st Cir.1993) (discussing *Fabe* and holding that Puerto Rico's filing deadline for proofs of claims against an insolvent insurance company did not regulate the business of insurance within the meaning of the McCarran-Ferguson Act because "it is neither directed at, nor necessary for, the protection of (continued...)

therefore, limit our analysis to whether Louisiana law overrides the Convention's requirement that the present dispute be submitted to arbitration because we construe an act of Congress to invalidate, impair, or supersede state law.

III

LSAT contends that the Convention was not self-executing and could only have effect in the courts of this country when Congress passed enabling legislation. Accordingly, LSAT argues that the Convention's enabling legislation is an "Act of Congress" within the meaning of the McCarran-Ferguson Act's provision that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . ."[22] LSAT reasons that the Convention has no effect

(footnote continued)

policyholders"), and that, at least in this context, the Louisiana statute's "connection to the ultimate aim of insurance is too tenuous," *see Fabe*, 508 U.S. at 509 ("The preferences conferred upon employees and other general creditors . . . do not escape pre-emption [by federal law] because their connection to the ultimate aim of insurance is too tenuous.").

We note that this court held in *American Bankers Insurance Co. of Florida v. Inman*, 436 F.3d 490 (5th Cir.2006), that the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), was reverse-preempted by the McCarran-Ferguson Act in the context of a dispute between an injured insured and his insurer regarding underinsured-motorist coverage governed by Mississippi law. We have no occasion to reconsider that holding today. The issue has not been presented in this appeal.

[22] 15 U.S.C. § 1012(b).

independent of legislation enabling it and that the McCarran-Ferguson Act requires us to construe the Convention's enabling legislation as reverse-preempted by the Louisiana statute. LSAT concedes, however, that if the Convention is self-executing, it would be a treaty and not an Act of Congress within the meaning of the McCarran-Ferguson Act.

The Underwriters addressed whether the Convention is self-executing only in briefs to the panel and not in any depth, instead maintaining primarily that even if the Convention were not self-executing, once implemented, it remains a treaty and is not an "Act of Congress" within the meaning of the McCarran-Ferguson Act.

It is unclear to us whether the Convention is self-executing. The Supreme Court's recent decision in *Medellín v. Texas*[24] instructs that "[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text."[24] In *Medellín*, the Court examined the Vienna Convention on Consular Relations[25] and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention[26] to determine whether a judgment of the International Court of Justice (ICJ) was "directly enforceable as domestic law in a state court in the

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[24] 552 U.S. 491, 128 S.Ct. 1346 (2008).

[24] *Id.* at 1357.

[25] Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

[26] Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487.

United States."[27] Considering the obligations imposed by Article 94 of the United Nations Charter in regard to those treaties, the Court concluded that it "does not provide that the United States 'shall' or 'must' comply with an ICJ decision, nor indicate that the Senate that ratified the U.N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts."[28]

Applying the reasoning of the Supreme Court in *Medellin*, we are to consider what the Convention says about its legal effect in domestic courts. The Convention expressly states that domestic courts "shall" compel arbitration when requested by a party to an international arbitration agreement.[29] The Convention additionally sets forth limited procedures to be followed in obtaining enforcement of an arbitration award.[30] However, the Supreme Court indicated in dicta in *Medellin* that at least the provisions of the Convention pertaining to the enforcement of judgments of international

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[27] *Medellin*, 128 S.Ct. at 1353. The United States had agreed to submit disputes arising out of the Vienna Convention to the ICJ, but the Supreme Court recognized that "submitting to jurisdiction and agreeing to be bound are two different things." *Id.* at 1358. The Court observed that the Optional Protocol "says nothing about the effect of an ICJ decision and does not itself commit signatories to comply with an ICJ judgment." *Id.*

[28] *Id.* at 1358.

[29] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(3), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

[30] *See id.* arts. III, IV.

arbitration tribunals are not self-executing.[31] This reference in *Medellín* could be read to imply that the Convention in its entirety is not self-executing, although such a conclusion cannot be drawn with any certainty from the brief discussion in the Court's opinion.

Even if the Convention required legislation to implement some or all of its provisions in United States courts, that does not mean that Congress intended an "Act of Congress," as that phrase is used in the McCarran-Ferguson Act, to encompass a non-self-executing treaty that has been implemented by congressional legislation. Implementing legislation that does not conflict with or override a treaty[32] does

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[31] *See Medellín*, 128 S.Ct. at 1366 ("Congress is up to the task of implementing non self-executing treaties, even those involving complex commercial disputes. The judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress. [citing 9 U.S.C. §§ 201-208] . . . Such language demonstrates that Congress knows how to accord domestic effect to international obligations when it desires such a result." (citation omitted)); *see also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (observing, although refusing to decide whether the Convention was self-executing, "Congress passed Chapter 2 of the United States Arbitration Act in order to implement the Convention" (citation omitted))

[32] The later-in-time rule applies to resolve a conflict between a treaty and a statute. *See Ejde v. Ejde*, 715 F.2d 999, 1013 (5th Cir. 1983) ("Under our Constitution, treaties and statutes are equal in dignity. If a treaty and a statute are inconsistent, 'the one last in date will control the other . . . .'" (omission in original) (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888))); *see also Medellín*, 128 S.Ct. at 1359 n.5 ("[A] later-in-time federal statute supersedes inconsistent treaty provisions."); *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam) ("[W]hen a statute which is subsequent in time is

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not replace or displace that treaty.[33] A treaty remains an international agreement or contract negotiated by the Executive Branch and ratified by the Senate,[34] not by Congress. The fact that a treaty is implemented by Congress does not mean that it ceases to be a treaty and becomes an "Act of Congress."

To accept LSAT's argument, we must conclude that when Congress used "Act of Congress" in the McCarran-Ferguson Act, it intended that phrase to exclude self-executing treaty provisions but to include treaty provisions that are implemented by federal legislation. This is untenable. The commonly understood meaning of an "Act of Congress" does not include a "treaty," even if the treaty required implementing legislation. As noted above, LSAT concedes that if the provisions in the Convention directing courts to enforce international arbitration agreements were self-executing, then the McCarran-Ferguson Act would have no preemptive effect because self-executing treaties are not an "Act of Congress." Yet, there is no apparent reason -- and

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inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.'" (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion))).

[33] *See United States v. Percheman*, 32 U.S. 51, 89, 7 Pet. 51 (1833) ("[The] understanding of the article [of the treaty] must enter into our construction of the acts of [C]ongress on the subject.").

[34] *See* U.S. Const. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . .").

LSAT has provided no rationale why Congress would have chosen to distinguish in the McCarran-Ferguson Act between treaty provisions that are self-executing and those that are not self-executing but have been implemented.[35] We do not consider it

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[35] Congress does not appear to distinguish between self-executing and implemented, non-self-executing treaties when using the term "treaty" in a generally applicable sense, as shown by various statutes that were promulgated in the era when the McCarran-Ferguson Act was enacted. *See* Revenue Act of 1941, Pub.L. No. 77-250, sec. 109, 55 Stat. 687, 695 (1941) (amending certain provisions of the Internal Revenue Code to exclude the application of those sections to residents of certain countries "so long as there is in effect with such country a treaty which provides otherwise"); Farm Labor Supply Appropriation Act, Pub.L. No. 78-229, sec. 3, 58 Stat. 11, 13 (1944) (authorizing the War Food Administrator to enter into agreements with agricultural extension services of State colleges to furnish certain services to domestic interstate and foreign agricultural workers and to "require the modification or termination of any agreement with any such extension service whenever he finds such action to be necessary in order to carry out the terms of any treaty or international agreement to which the United States of America is signatory").

In other federal statutes that are currently in effect, it does not appear that Congress has used the term "treaty" to exclude implemented non-self-executing treaties. As an example, in our immigration laws, the term "immigrant" "means every alien except ... an alien entitled to enter into the United States under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national ..." 8 U.S.C. § 1101(a)(15)(E). This provision would not seem to exclude a treaty that is non-self-executing but that has been implemented by an Act of Congress.

It would seem that "treaty" would include all implemented treaties, regardless of whether they were self-executing or had

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reasonable to construe the term "Act of Congress" in the McCarran-Ferguson Act as an indication of congressional intent to permit state law to preempt implemented, non-self-executing treaty provisions but not to preempt self-executing treaty provisions.

Our conclusion that Congress did not intend the term "Act of Congress," as used in the McCarran-Ferguson Act, to reach a treaty such as the Convention is buttressed by the terms of the Convention Act. When Congress amended the FAA in 1970 to include provisions that dealt with the Convention, it provided in 9 U.S.C. § 203, that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States." This is a direct indication that Congress thought that for jurisdictional purposes, an action falling under the Convention arose not only under the laws of the United States but also under *treaties* of the United States. Accordingly, even in the very act of Congress that was arguably necessary to implement the Convention in domestic courts, Congress recognized that jurisdiction over actions to enforce rights under the Convention did not arise solely under an "Act of Congress."

(footnote continued)

required implementing legislation. Yet, if we were to conclude that implemented non-self-executing treaties can be nothing more than an "Act of Congress," then none of the references to a "treaty" or "treaties" in the enactments we have discussed would include implemented, non-self-executing treaties. This is not a reasonable construction of these enactments.

Equally important in the present case, it is a treaty (the Convention), not an act of Congress (the Convention Act), that we construe to supersede Louisiana law.[36] The Convention Act states that the Convention "shall be enforced in United States courts in accordance with this chapter."[37] The Convention Act defines when an arbitration agreement "falls under the Convention" – principally when it is "commercial" and does not "aris[e] out of . . . a [legal] relationship which is entirely between citizens of the United States . . . unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."[38] The Convention Act provides United States courts with jurisdiction over "[a]n action or proceeding falling under the Convention . . . regardless of the amount in controversy."[39] But the

[36] *Cf. Humana Inc. v. Forsyth*, 525 U.S. 299, 307-10 (1999) (defining "to invalidate" to mean "to render ineffective, generally without providing a replacement rule or law", "to impair" to mean "[t]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner", and "to supercede" to mean "to displace (and thus render ineffective) while providing a substitute rule" (citations omitted)).

[37] 9 U.S.C. § 201.

[38] *Id.* § 202. There is no doubt that the present dispute among three insurers arises out of legal relationships that are commercial. We are not called upon to explore the outer bounds of what "commercial" legal relationships may encompass.

[39] *Id.* § 203. LSAT does not argue that this jurisdictional statute, or other jurisdictional statutes such as 28 U.S.C. § 1331, invalidates, impairs, or supersedes Louisiana's law. We look skeptically on a claim that the McCarran-Ferguson Act intended to deny diversity jurisdiction or federal question (continued...)

Convention Act does not in this case operate without reference to the contents of the Convention. It is *the Convention* under which legal agreements "fall";[40] it is an action or proceeding under *the Convention* that provides the court with jurisdiction;[41] such an action or proceeding is "deemed to arise under the laws *and treaties*" of the United States,[42] the treaty in this case being the Convention; and when chapter 1 of title 9 (the FAA) conflicts with the Convention, *the Convention* applies.[43]

The Convention Act directs us to the treaty it implemented, and when we "construe" the Convention, we are faced with the possibility of "superseding" the Louisiana law. The Convention requires that each signatory nation "shall recognize an agreement in writing under which the parties undertake to submit to arbitration" their dispute "concerning a subject matter capable of settlement by

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jurisdiction to federal courts in the state of Louisiana. *See Grimes v. Crown Life Ins. Co.*, 857 F.2d 699, 702-03 (10th Cir.1988).

[40] 9 U.S.C. § 202, *see also id.* § 205 ("Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant . . . may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States . . . .").

[41] *Id.* § 203.

[42] *Id.* (emphasis added).

[43] *Id.* § 208 ("Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.")

arbitration,"[44] and provides for direct enforcement in a signatory nation's courts, which "when seized of [a covered] action . . . shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null or void, inoperative or incapable of being performed."[45] The Convention itself contains defenses to the enforceability of an arbitration agreement by requiring that it is "in writing," regulates a "subject matter capable of settlement by arbitration," and is not "null and void, inoperative or incapable of being performed."[46] Accordingly, it is by reference to the Convention that we have a command — a judicially enforceable remedy — that we "supersede" Louisiana

[44] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(1), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

[45] *Id.* art. II(3).

[46] *Id.* art. II(1), (3). Plaintiffs have not raised various defenses to arbitrability that are available *under the Convention*. For example, the Supreme Court noted that "Art. II(1) of the Convention, which requires the recognition of agreements to arbitrate that involve 'subject matter capable of settlement by arbitration,' contemplates exceptions to arbitrability grounded in domestic law." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n.21 (1985). "Yet in implementing the Convention by amendment to the Federal Arbitration Act, Congress did not specify any matters it intended to exclude from its scope." *Id.* "Doubtless, Congress may specify categories of claims it wishes to reserve for decision by our own courts without contravening this Nation's obligations under the Convention." *Id.* But the Court "decline[d] to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions *where Congress has not expressly directed the courts to do so*." *Id.* (emphasis added).

law unless there are defenses set forth in the Convention that counteract that command. Because here the Convention, an implemented treaty, rather than the Convention Act, supersedes state law, the McCarran-Ferguson Act's provision that "no Act of Congress" shall be construed to supersede state law regulating the business of insurance is inapplicable.

IV

The dissent contends that an *implemented* non-self-executing treaty is not a treaty within the meaning of the Supremacy Clause and cannot preempt state law. With great respect, none of the Supreme Court decisions cited in the dissenting opinion so hold.[47]

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[47] The simple phrase from the Supreme Court's decision in *Whitney v. Robertson*, 124 U.S. 190, 194 (1888), on which the dissent relies, *post* at –, n. 11, cannot bear the weight assigned to it. The dissent quotes a passage from *Whitney*: "[w]hen [a treaty and legislation] relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other; *provided, always, the stipulation of the treaty on the subject is self-executing.*" *Id.* at 194 (emphasis added). The Court was discussing the well-recognized principle of law that when a treaty and legislation passed by Congress conflict, the latter in time controls. The phrase italicized by the dissent only emphasizes that in the context of the sentence containing the phrase, the Court was referring to a self-executing treaty because a non-self-executing treaty that cannot be judicially enforced cannot override a statute. The discussion in *Whitney* does not consider whether an *implemented* non-self-executing treaty may supersede prior legislation, just as a self-executing treaty may.

(continued...)

The dissent quotes from the Ninth Circuit's decision in *Hopson v. Kreps*,[48] without providing the context of the quoted passages.[49] The Ninth Circuit observed in that case that an implementing statute should be given its plain meaning even if that interpretation conflicts with the treaty it implements.[50] The Ninth Circuit did not hold that an implemented treaty has no independent significance, as the dissent implies.[51]

(footnote continued)

Similarly, the dissent lifts quotations from *Edye v. Robertson (Head-Money Cases)*, 112 U.S. 580, 598-99 (1884), out of context. The Supreme Court held only that Congress may, through subsequent legislation, supersede a treaty that has "become the subject of judicial cognizance in the courts of this country." *Id.* at 599.

[48] 622 F.2d 1375 (9th Cir. 1980).

[49] *Post* at --.

[50] *Hopson*, 622 F.2d at 1380 ("Thus, where courts have been persuaded as to the proper interpretation of an implementing statute, that judgment [regarding the intended meaning of the terms of the statute] has not been affected by the claim that the reading given the statute was inconsistent with the intent of the parties to the treaty.").

[51] The dissent additionally cites, *post* at --, the concurring opinion in *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 879 (D.C.Cir.2006) (Kavanaugh, J., concurring) (quoting Restatement (Third) of the Foreign Relations Law of the United States § 111 cmt. h (1987) ("Strictly, it is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States.")). The majority opinion in *Fund for Animals, Inc.* held that if legislation conflicts with a treaty it implements, the implementing legislation controls. 472 F.3d at 879.

The dissent relies on a "consensus of legal scholars" regarding the status of implemented non-self-executing treaties.[52] This "consensus" consists of one or two sentences in publications of relatively recent vintage, most of which provide no analysis or citation of authority. The Restatement (Third) of the Foreign Relations Law of the United States § 111, comment h (1987), is the earliest scholarly source cited by the dissent. The Reporter for that Restatement was Professor Louis Henkin, arguably an advocate for the enforcement of implemented treaty provisions.[53]

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[52] *Post* at .

[53] A discussion of self executing and non self executing treaties appears in at least two of Professor Henkin's publications, L. Henkin, *Foreign Affairs and the United States Constitution*, 198-204 (2d ed. 1996); L. Henkin, *Foreign Affairs and the United States Constitution*, 156-161 (1972). A footnote in the former contains the "[s]trictly" sentence that appears in comment h of the Restatement. L. Henkin, *Foreign Affairs and the United States Constitution*, 200 n* (2d ed. 1996). However, he wrote immediately following that sentence that "[s]ometimes the implementing legislation gives the treaty itself legal effect or incorporates it by reference." *Id.* Professor Henkin also opined

> The difference between self-executing and non self-executing treaties is commonly misunderstood. Whether a treaty is self-executing or not, it is legally binding on the United States. Whether it is self-executing or not, it is supreme law of the land. If it is not self-executing, Marshall said, it is not "a rule for the court", he did not suggest that it is not law for the President or for Congress. It is their obligation to see to it that it is faithfully implemented; it is their obligation to do what is

(continued...)

Our court has exhibited an understanding that implemented provisions of a non-self-executing treaty can themselves be given effect by the courts as federal law.[54] The dissent concludes that we used "imprecise language" in each of these cases.[55] To the extent that is true, we note that the Supreme Court has used language similar to that which the dissent labels "imprecise."[56]

(footnote continued)

> necessary to make it a rule for the courts if the treaty requires that it be a rule for the courts, or if making it a rule for the courts is a necessary or a proper means for the United States to carry out its obligation.

Id. at 203-04.

[54] *See Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 902-03 (5th Cir.2005) ("It goes without saying that, upon the United States signing a treaty and Congress adopting enabling legislation, *the treaty becomes the supreme law of the land*." (emphasis added)); *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 120 F.3d 583, 586 (5th Cir.1997) (refusing to decide "whether *the Convention* preempts La. R.S. 22:629" (emphasis added)); *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1145 (5th Cir.1985) (holding that if an arbitration agreement qualifies, "*the Convention* requires district courts to order arbitration" (emphasis added)). Thus, "[b]ecause the United States is a signatory to the Convention, and Congress enacted enabling legislation, *the Convention* is applicable as federal law in this case." *Lim*, 404 F.3d at 903 (emphasis added).

[55] *Post* at ___.

[56] In common parlance, an implemented non-self-executing treaty provision can be "enforced" as the law of the land, and a non-self-executing treaty provision can become "domestic law" when implemented. The Supreme Court itself expressed these concepts in *Medellin v. Texas*, 552 U.S. 491, 128 S.Ct. 1346, 1356 (2008), although the precise question of whether an (continued...)

However, we need not and do not undertake to determine the precise or technical contours of how or whether implemented non-self-executing treaty provisions become the "Law of the Land" under the Supremacy Clause. Our task in the present case is to determine if, in enacting the McCarran-Ferguson Act, Congress intended for state law to reverse-preempt federal law that has as its source an implemented non-self-executing treaty.

(footnote continued)

implemented treaty or its implementing legislation or both are given effect under the Supremacy Clause was not at issue. In *Medellín*, the Supreme Court said, "[w]hen, in contrast, '[treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect.'" *Id.* (alteration in original) (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)). This indicates that in speaking of even non-self-executing treaties, it is commonly thought that treaty stipulations can themselves be enforced once implemented by legislation. Similarly, the Supreme Court said, "[i]n sum, while treaties 'may comprise international commitments . . . they are not domestic law *unless* Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be "self-executing" and is ratified on these terms.'" *Id.* (citation omitted) (emphasis added). Here again, this statement exhibits a commonly held conception that a treaty provision can itself become domestic law once implemented. *See also id.* at 1356 n.2 ("Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress."), *id.* ("[N]one of these treaty sources creates binding federal law in the absence of implementing legislation . . . ."), *id.* at 1369 (recognizing "two means . . . for giving domestic effect to an international treaty obligation under the Constitution," which are the making of a self-executing treaty and the implementation of a non-self-executing treaty).

V

There is precedent that at the time of the McCarran-Ferguson Act's enactment, courts analyzed treaties, even when implemented by an Act of Congress, as treaties. The Supreme Court's decision in *Missouri v. Holland*[57] reflects that a treaty followed by implementing legislation remains a treaty that, where relevant, is viewed as distinct from an Act of Congress. The United States had consummated a non-self-executing treaty with Great Britain to protect migratory birds.[58] An act was passed giving effect to this treaty, directing the Secretary of Agriculture to promulgate regulations and prohibiting the killing of migratory birds except as permitted by regulations compatible with the treaty.[59] The State of Missouri sought to prohibit the enforcement of this Act and the Secretary's regulations, arguing that the statute interfered with rights reserved to the states by the Tenth Amendment.[60] The Court observed that "[a]n earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad."[61] The Supreme Court, however, recognized a difference between acts of Congress under the Commerce Clause and "a treaty followed by such an

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[57] 252 U.S. 416 (1920).

[58] *Id.* at 431.

[59] *Id.* at 431-32.

[60] *Id.* at 430-31.

[61] *Id.* at 432.

act," as authorized pursuant to the Necessary and Proper Clause.[52] The validity of the implementing legislation under the Necessary and Proper Clause turned on the constitutionality of the treaty – even though it was implemented by an Act of Congress. The Court said,

> [w]hether the two cases cited [holding the prior Acts of Congress "bad"] were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States.[53]

The Court continued,

> [w]e do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could . . .[54]

The Court assumed that "but for the treaty the State would be free to regulate [migratory birds within its

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[52] *Id.* at 433.

[53] *Id.*

[54] *Id.*

boundaries[] itself."[65] But the Court explained, "[v]alid treaties, of course are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States."[66] The Court continued, "[n]o doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power."[67] Because the treaty was constitutional, the Supreme Court ultimately concluded "that the treaty and statute must be upheld."[68] The Supreme Court decided *Holland* in 1920, so when Congress passed the McCarran-Ferguson Act two decades later (and the Convention Act half a century later), it was well aware that a treaty, even if requiring implementation, was distinct from an Act of Congress and could serve as the source of authority to "override [a state's] power."[69]

We think it unlikely that when Congress crafted the McCarran-Ferguson Act, it intended any future treaty implemented by an Act of Congress to be abrogated to the extent that the treaty conflicted in some way with a state law regulating the business of insurance if Congress's implementing legislation did not expressly save the treaty from reverse-preemption by state law. If this had been Congress's intent, it seems probable that Congress would have

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[65] *Id.* at 434.

[66] *Id.* (citations and internal quotation marks omitted).

[67] *Id.*

[68] *Id.* at 435.

[69] *Id.* at 434.

included a term such as "or any treaty requiring congressional implementation" following "Act of Congress" and "such Act" in the McCarran-Ferguson Act.[70] There is no indication in the McCarran-Ferguson Act that Congress intended, through the preemption provision and the use of the term "Act of Congress," to restrict the United States' ability to negotiate and implement fully a treaty that, through its application to a broad range of international agreements, affects some aspect of international insurance agreements.[71]

[70] 15 U.S.C. § 1012(b).

[71] *Cf. Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). In *American Insurance Association v. Garamendi*, the Supreme Court considered whether a state law, aimed at aiding Holocaust victims by requiring insurers to disclose information about insurance policies sold in Europe before and during World War II, interfered with the federal government's conduct of foreign relations. *Id.* at 401. The President had entered into an executive agreement with Germany's chancellor in which the United States agreed that whenever a German company was sued in an American court regarding a Holocaust-era claim, the United States government would submit a statement that adjudicating such a claim was against the United States' "foreign policy interests." *Id.* at 406. The Supreme Court observed that "[g]enerally, . . . valid executive agreements are fit to preempt state law, just as treaties are, and if the agreements here had expressly preempted laws like [California's law], the issue would be straightforward." *Id.* at 416-17 (footnote omitted). Because an implied conflict existed, the Court ultimately concluded that the state law was preempted. *Id.* at 420-27. In addressing California's argument that in the McCarran-Ferguson Act "Congress authorized state laws of [the] sort [California had enacted]," the Court said,

(continued...)

VI

Our conclusion that referral to arbitration is proper in this case is bolstered by the congressionally sanctioned national policy favoring arbitration of international commercial agreements. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[72] the Supreme Court considered the "arbitrability, pursuant to the Federal Arbitration Act and the [Convention], of claims arising under the Sherman

(footnote continued)

> As the text itself makes clear, the point of McCarran-Ferguson's legislative choice of leaving insurance regulation generally to the States was to limit congressional preemption under the commerce power, whether dormant or exercised . . . . [A] federal statute directed to implied preemption by domestic commerce legislation cannot sensibly be construed to address preemption by executive conduct in foreign affairs.

Id. at 427 28. Although addressing an executive agreement, not a treaty, the Court's holding is nonetheless relevant here. The Court signaled that the McCarran-Ferguson Act is focused on "implied preemption by domestic commerce legislation," not executive conduct in consummating foreign agreements. Of course, in this case, we are dealing with the President's treaty-making authority, the Senate's treaty approval authority, and Congress's authority to implement or facilitate such a treaty pursuant to the Necessary and Proper Clause. *See* U.S. Const. art. II, § 2, cl. 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ."); *Missouri v. Holland*, 252 U.S. 416, 432 (1920) ("If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government").

[72] 473 U.S. 614 (1985).

Act and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction."[73] The Court held such claims were arbitrable.[74] It emphasized that "[a]s international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade."[75] The Court admonished:

> If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration," and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.[76]

In the process, the Supreme Court explained that "not . . . all controversies implicating statutory rights

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[73] *Id.* at 616 (citations omitted).

[74] *Id.* at 626–27.

[75] *Id.* at 638.

[76] *Id.* at 638–39 (quoting *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)).

are suitable for arbitration."[77] In determining which are not, the Court said,

> [j]ust as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the *congressional intention expressed in some other statute* on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable.[78]

The Supreme Court explained that federal antitrust law did not show such a congressional intent. Importantly, the Court said, "[w]e must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history."[79] We discern no such deducible intent in the McCarran-Ferguson Act.

Although the McCarran-Ferguson Act embodies a strong policy that the states have an interest in the regulation of the business of insurance, concerns that a state's regulatory policies regarding such contracts may not be recognized in an international arbitration are ameliorated by the substantive provisions in the Convention and are not a basis for refusing to

[77] *Id.* at 627.

[78] *Id.* (emphasis added).

[79] *Id.* at 628.

require that an arbitration go forward. As the Supreme Court observed in *Mitsubishi* with regard to the substance of federal antitrust law, "[h]aving permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed."[80] The same is true of substantive Louisiana law that applies to the reinsurance agreements presently at issue.

VII

We are aware that our decision conflicts with that of the Second Circuit in *Stephens v. American International Insurance Co.*[81] That case held that "the Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation."[82] The Second Circuit concluded that Congress's "implementing legislation [did] not preempt"[83] a Kentucky statute that "subordinated" all "choice of law or arbitration provisions" in a contract to which an insolvent insurer in liquidation proceedings was a party.[84] The court reasoned that "when the terms of [a treaty] import a contract –

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[80] *Id.* at 638. The Court observed that "[w]hile the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them." *Id.*

[81] 66 F.3d 41 (2d Cir. 1995).

[82] *Id.* at 45.

[83] *Id.*

[84] *Id.* at 43.

when either of the parties engage[s] to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court."[85] The court then quoted the "[n]o Act of Congress" provision in the McCarran-Ferguson Act and said, "[a]ccordingly, the implementing legislation does not preempt the Kentucky Liquidation Act."[86]

We agree, of course, that when provisions of a treaty are not self-executing, they cannot be enforced in a court in this country unless and until those provisions are implemented by Congress. But, we submit, this does not answer the question of what Congress intended when it used the terms "[n]o Act of Congress" and "such Act" in the McCarran-Ferguson Act or why Congress would have addressed only treaties that required implementation by Congress. The text of the McCarran-Ferguson Act does not support the inclusion by implication of "a treaty implemented by an Act of Congress." Because we give the phrases "Act of Congress" and "such Act" their usual, commonly understood meaning, we conclude that implemented treaty provisions, self-executing or not, are not reverse-preempted by state law pursuant to the McCarran-Ferguson Act. We find no indication from the text of the McCarran-Ferguson Act that Congress intended to signal a distinction between self-executing and non-self-

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[85] *Id.* at 45.

[86] *Id.*

executing-but-implemented treaties in the McCarran-Ferguson's reverse-preemption clause.

We also note that the reasoning of the Second Circuit in *Stephens v. American International Insurance Co.* is at least in tension with that of its subsequent decision in *Stephens v. National Distillers & Chemical Corp.*,[87] in which the Second Circuit held that the McCarran-Ferguson Act did not cause a state law requiring out-of-state insurers to post security before participating in court proceedings to preempt the Foreign Sovereign Immunities Act.[88] In support of its first alternative ground for that holding, the Second Circuit reasoned that it must "apply federal law to the insurance industry, in spite of the McCarran-Ferguson Act, whenever federal law clearly intends to displace all state laws to the contrary."[89] The McCarran-Ferguson Act does not "force a federal law that clearly intends to preempt all other state laws to give way simply because the insurance industry is involved."[90] In a footnote appended to this statement, the court concluded that because an additional, alternate ground (that international law preempted the state insurance law before the passage of both the McCarran-Ferguson Act and the Federal Sovereign Immunities Act) supported its holding, it "need not consider whether [its decision to

[87] 69 F.3d 1220 (2d Cir.1995)

[88] *Id.* at 1231.

[89] *Id.* at 1233.

[90] *Id.*

apply federal law when it was clearly intended to displace all state law] is in conflict with the holding in [*Stephens v.*] *American* [*International Insurance Co.*]."[91]

In sum, the McCarran-Ferguson Act does not cause Louisiana Revised Statutes § 22:868 to reverse-preempt the Convention with regard to the dispute before us.

VIII

We finally consider Safety National's request that we affirm the district court's ruling that the rights under the policies are assignable. The order embodying that ruling, dated August 13, 2003, has not been certified by the district court under 28 U.S.C. § 1292(b). We therefore lack appellate jurisdiction to consider it.[92]

* * *

We VACATE the district court's order denying the motion to compel arbitration and REMAND for further proceedings consistent with this opinion.

[91] *Id.* at 1233 n. 6.

[92] *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) ("The court of appeals may not reach beyond the certified order to address other orders made in the case.")

EDITH BROWN CLEMENT, Circuit Judge, concurring in the judgment:

I would hold that the relevant treaty provision, Article II of the Convention, is self-executing and that it therefore preempts Louisiana Revised Statute § 22:868 by virtue of the Supremacy Clause. This result is dictated by the decisions of the Supreme Court, most recently in *Medellin v. Texas*, 552 U.S. 491 (2008), differentiating self-executing from non-self-executing treaty provisions. The conclusion that Article II is self-executing possesses the added benefit of avoiding a difficult constitutional question,[1] namely what preemptive effect (if any) non-self-executing but implemented treaty provisions

[1] "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tenn. Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Although this principle is commonly invoked as the canon of avoidance in statutory construction, *see Clark v. Martinez*, 543 U.S. 371, 381 (2005) (describing the canon as "a tool for choosing between competing plausible interpretations of a statutory text"), courts, including this one, have also interpreted treaties to avoid constitutional questions. *See, e.g.*, *Parretti v. United States*, 122 F.3d 758, 769 (9th Cir.1997), *rev'd en banc on other grounds*, 143 F.3d 508 (9th Cir.1998) (en banc); *Caltagirone v. Grant*, 629 F.2d 739, 747-48 (2d Cir.1980); *cf. Hidalgo County Water Control and Improvement Dist. No. 7 v. Hedrick*, 226 F.2d 1, 6-7 (5th Cir.1955) ("'We should seek to avoid, if possible, a decision adjudging a treaty to be in conflict with the Constitution. It is not necessary to a decision in this case for us to pass upon the question of whether the treaty is violative of the prohibitions of the Federal Constitution, as we would be compelled to do if the treaty required the construction contended for by Appellants.'" (quoting *Amaya v. Stanolind Oil & Gas Co.*, 158 F.2d 554, 557 (5th Cir.1946)).

have under the Supremacy Clause. The majority is convinced that such treaty provisions have full preemptive effect, proceeding on the assumption that Article II is not self-executing. The dissent, meanwhile, persuasively refutes the majority's answer to the constitutional question, but its disposition relies on a finding that no provision of the Convention is self-executing. Neither opinion confronts the important antecedent question whether Article II is in fact self-executing.[2] The opinions'

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[2] Contrary to the dissent's conclusion, the Underwriters have not waived the self-execution argument. In their opening brief to the panel, they contended that the treaty provision was self-executing by stressing their reliance "solely upon the provisions of Article II of the Convention . . . and not on any special implementing legislation." Appellant Br. 33 n. 17. That this argument was presented to the panel is plainly reflected in its opinion. *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London*, 543 F.3d 744, 749 (5th Cir.2008), *vacated and reh'g en banc granted*, 558 F.3d 509 (5th Cir.2009) ("The Underwriters maintain that the Convention was ratified after the McCarran Ferguson Act was enacted and that in any event, *the Convention is self-executing*, which means that it did not require an act of Congress to have effect in United States courts. The Underwriters assert that a 'later in time self-executing treaty supercedes a federal statute if there is a conflict'" (emphasis added)).

In addition, none of the cases cited by the dissent establishes that a party suffers waiver should it fail to repeat to the en banc court every argument that it made to the panel. Further, read in context, the language taken by the dissent from the Underwriters' en banc reply brief does not concede the self-execution point. As the section heading preceding that language makes clear, the Underwriters addressed the "primary" question "[p]osed by the [p]anel." Appellant En Banc Reply Br. 6. Underwriters should not be penalized for focusing their en banc briefing on the major issue addressed by the panel. Relatedly, LSAY cannot complain that it lacks notice of (continued...)

contrasting interpretations of the Supremacy Clause are unnecessary to decide the case because the plain text of Article II of the Convention compels a finding of self-execution.

In *Medellín*, the Court "recognized the distinction between treaties that automatically have effect as domestic law, and those that – while they constitute international law commitments – do not by themselves function as binding federal law." 128 S.Ct. at 1356. The Court traced this distinction to *Foster v. Neilson*, in which Chief Justice Marshall explained:

> Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

27 U.S. (2 Pet.) 253 (1829). That non-self-executing

(footnote continued)

self-execution as a ground for disposition because its en banc brief understands the self-execution question to be contested, urging the court to "find . . . that the Convention was not self-executing." Appellee En Banc Br. 27-40.

provisions depend upon congressional implementing legislation to take effect as enforceable domestic law was recognized as early as *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect . . . ."). Self-executing provisions, on the other hand, "require no legislation to make them operative" and "have the force and effect of a legislative enactment." *Id.*

The text of the relevant treaty provision, Article II, provides:

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said

> agreement is null and void, inoperative or incapable of being performed.

Medellin provides lower courts with a framework for determining whether treaty provisions are self-executing. The Court made clear that "[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellin*, 128 S.Ct. at 1357; *see id.* at 1361-62 (identifying "explicit textual expression" as the focus of the self-execution analysis). Although the Supreme Court has never expressly held that individual treaty provisions may be self-executing, while a treaty in its entirety may not be, its case law leads inescapably to this conclusion. As early as *Whitney*, the Court differentiated between the two types of provisions:

> When the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment.

124 U.S. at 194. More recently, the *Medellin* Court noted its "obligation to interpret treaty *provisions* to determine whether *they* are self-executing." 128

S. Ct. at 1362 (emphases added).[3]

Of particular concern here is Section 3 of Article II, which provides that domestic courts, upon request of a litigant, shall enforce any arbitration agreement to which that litigant is a party by referring the parties to arbitration. Section 3 is addressed to the courts of Contracting States, not to the States themselves or to their respective legislatures.[4] Further, Section 3 provides that a "court . . . shall . . . refer the parties to arbitration." Referral to arbitration is mandatory, not discretionary. Treaty provisions setting forth international obligations in such mandatory terms tilt strongly toward self-execution. *See id.* at 1358, 1359 n. 5 (distinguishing between treaty language that constitutes a commitment to future action, such as "undertakes to comply," and treaty language using "shall" or "must").

[3] This court has reached a similar conclusion. *See United States v. Postal*, 589 F.2d 862, 878 (5th Cir. 1979) (recognizing the United States's capacity to enter into a multilateral treaty containing provisions which do not require implementing legislation). The fact that other, unrelated provisions of the Convention could be read to contemplate future legislative implementation Articles X and XI, for instance does not render the entire treaty non-self-executing, especially when the plain text of Article II counsels to the contrary.

[4] Article II, Section 1 does contain a reference to Contracting States which provides that such States "shall recognize" arbitration agreements. Any suggestion that this reference renders Article II non-self-executing is overcome by the fact that Section 3 sets forth a specific mechanism enforcement by referral to arbitration and tasks the courts of Contracting States and not their legislatures, with accomplishing that recognition.

The text of Article II constitutes "a directive to domestic courts." *Id.* at 1358 (identifying the failure of Article 94 of the United Nations charter to include a directive to domestic courts as a basis for a finding of non-self-execution). It leaves no discretion to the political branches of the federal government whether to make enforceable the agreement-enforcing rule it prescribes; instead, that rule is enforceable by the Convention's own terms.[5] *See Foster*, 27 U.S. at 314 (declaring a treaty to be self-executing "whenever it operates of itself without the aid of any legislative provision"). In the *Head Money Cases*, the Supreme Court explained that when a treaty provision addresses "rights . . . of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." *Edye v. Robertson*, 112 U.S. 580, 599 (1884)

[5] There is a plausible argument that the "null and void" language of Article II, Section 3 would permit a domestic court to refuse to enforce an arbitration agreement because of a contrary state law such as § 22-868. However, in *Scherk v. Alberto-Culver Co.*, the Supreme Court heeded the "concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements." 417 U.S. 506, 520 n.15 (1974). Further, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court acknowledged that Congress could carve out "categories of claims it wishes to reserve for decision by our own courts," but made no mention of individual states' capacity to do so. 473 U.S. 614, 639 n.21 (1985). It follows that whatever Congress's ability to specify when an arbitration agreement is "null and void," a state law is powerless to undermine the "utility of the Convention in promoting the process of international commercial arbitration." *Id.*

[*Head Money Cases*], *id.* at 598-99 ("A treaty, then, is a law of the land as an act of congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined."). The terms of Article II do not merely describe arbitration rights which are "of a nature to be enforced in a court of justice," but expressly instruct courts to enforce those rights by referring the parties to arbitration. In short, Article II of the Convention is self-executing and fully enforceable in domestic courts by its own operation.[6] It is entitled to

[6] The *Medellin* Court pointed out that in prior cases, in addition to a treaty's text, it had "also considered as 'aids to [a treaty's] interpretation' the negotiation and drafting history of the treaty as well as 'the post ratification understanding' of signatory nations." 128 S. Ct. at 1357 (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)), *see also Air France v. Saks*, 470 U.S. 392, 396 (1985) ("Treaties are construed more liberally than private agreements, and to ascertain their meaning we *may* look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties." (emphasis added) (quotation and alteration omitted)). Because the treaty text is clear, I see no need to rely on such extra-textual "aid," to interpret its meaning.

I would note, however, that the existence of the Convention Act is not inconsistent with a finding that Article II is self-executing. On July 31, 1970, Congress passed the Convention Act, the United States acceded to the Convention on September 30, 1970, and its accession entered into force on December 29, 1970. That Congress acted prior to accession taking effect suggests that the Convention Act was intended to establish limitations upon the enforcement of the Convention in domestic courts before it would otherwise take effect. *See Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("Congress may modify [self-executing] provisions, so far as they bind the United States, or supersede them altogether."). *Head Money Cases*, 112

(continued...)

recognition as "the supreme Law of the Land" under the Supremacy Clause. U.S. Const. art. VI, cl. 2.

Certain references to the Convention and Convention Act by the *Medellín* Court, the Second Circuit, and this court arguably support a contrary position. I briefly explicate why this is not the case. In *Medellín*, the Court cited the Convention Act for the proposition that "[t]he judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress." *Medellín*, 128 S.Ct. at 1366. It went on to state: "Such language demonstrates that Congress knows how to accord domestic effect to international obligations when it desires such a result." *Id.* The majority construes this dictum narrowly, opining that it "could be read to imply that the Convention in its entirety is not self-executing, although such a conclusion cannot be drawn with any certainty from the brief discussion in the Court's opinion." I would conclude that the dictum offers little support for the view that the Convention is non-self-executing in all respects.

Importantly, *Medellín* itself concerned the enforceability of a judgment of the International Court of Justice. *See id.* at 1356 ("The question we confront here is whether the *Avena* judgment has

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(footnote continued)

U.S. at 580 ("[S]o far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such acts as congress may pass for its enforcement, modification, or repeal.")

automatic *domestic* legal effect such that the judgment of its own force applies in state and federal courts." (emphasis in original)). The Court's dictum cited the Convention Act as an exemplar of Congress's ability to accord "domestic effect" to the judgments of similar international tribunals. The United States's obligation to "recognize arbitral awards as bin ding" is set forth in Article III of the Convention.[2] It was therefore Article III, and not Article II, that the *Medellín* Court was addressing. Unlike Article II, Article III contains no language addressed to the courts of Contracting States and instead addresses itself only to the Contracting States themselves. The "international obligation [ ]" to which Congress was according "domestic effect" was therefore the one spelled out in Article III, the recognition of arbitral awards as binding and enforceable. That Congress would perceive a need to enact implementing legislation to render Article III enforceable in domestic courts says nothing about Article II's self-execution status, especially where,

[2] Article III states in full:

> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

unlike Article II, Article III lacks an explicit directive to "[t]he court of a Contracting State." I would not read the *Medellín* Court as having indicated that the Convention is non-self-executing.

Meanwhile, the Second Circuit, in *Stephens v. American International Insurance Co.*, concluded that "the Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation." 66 F.3d 41, 45 (5th Cir.1995). The court, however, undertook no textual analysis and set forth no reasons to support its conclusion. Moreover, the case was decided before *Medellín*, which provides critical guidance to lower courts for determining when treaty provisions are self-executing. Similarly, other panels of this court appear to have concluded that the treaty, as a whole, was enforceable only after Congress passed the Convention Act.[8] Again, these decisions predate the instructions set forth in *Medellín* and do not appear to have specifically considered the text of Article II.

Although there may be a growing judicial consensus that multilateral treaties are presumptively non-self-executing, my conclusion that Article II of the Convention is self-executing is

[8] *See Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 903 (5th Cir.2005) ("Because the United States is a signatory to the Convention, and Congress enacted enabling legislation, the Convention is applicable as federal law in this case."); *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1145 (5th Cir.1985) ("The Convention was negotiated pursuant to the Constitution's Treaty power. Congress then adopted enabling legislation to make the Convention the highest law of the land.").

compelled by a straightforward application of binding Supreme Court precedent. The majority and dissent bypass the self-execution question. I would instead hew, as we must, to the plain language of *Medellín* and conclude that Article II is self-executing.

Because Article II of the Convention mandates enforcement of arbitration agreements, it conflicts with and therefore preempts Louisiana law. On this basis, I would vacate the district court's denial of the motion to compel arbitration and remand for further proceedings.

JENNIFER W. ELROD, Circuit Judge, with whom JERRY E. SMITH and EMILIO M. GARZA, Circuit Judges, join, dissenting:

Today the court concludes that an Act of Congress is not really an Act of Congress. In doing so, it holds that a non-self-executing treaty,[1] the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[2] (Convention), preempts a state law. Because a non-self-executing treaty cannot itself provide a rule of decision in U.S. courts, the only candidate for a source of federal law with preemptive force under the Supremacy Clause is the statute that implements the treaty. The McCarran-Ferguson Act[3] requires that federal statutes that affect the business of insurance do so explicitly. The implementing statute does not do so, and it is therefore powerless to preempt state law. For this reason, the district court ruled correctly, and I respectfully dissent.

I.

The court errs today in what should have been an exercise in garden-variety statutory interpretation: instead of answering the question of whether the legislation implementing the Convention (the Convention Act)[4] is an "Act of Congress" within the

[1] The question of whether or not the treaty is self-executing is not before the court. *See infra* note 31.

[2] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (Convention).

[3] 15 U.S.C. §§ 101-115.

[4] 9 U.S.C. §§ 201-208.

meaning of the McCarran-Ferguson Act, the court frames its approach[5] as an inquiry into whether the Convention itself is an Act of Congress. The court no longer explicitly endorses the panel's dubious "hybrid" holding that "the treaty followed by the implementing legislation must be considered as the sum of its parts, not piecemeal."[6] However, the court's failure to ask the right question at the outset inevitably leads to its incorrect conclusion that *the Convention itself*, a non-self-executing treaty, preempts the Louisiana statute.[7] This holding is a doctrinal novelty of our circuit's own creation, as there is no precedent holding that a non-self-

[5] *See* Op. at [illegible] ("[I]t is when we construe a treaty [illegible] that the state law at issue is superseded."); Op. at [illegible] ("[I]t is a treaty (the Convention), not an act of Congress (the Convention Act), that we construe to supersede Louisiana law."); *see also* Op. at [illegible] ("The fact that a treaty stands on equal footing with legislation when implemented by Congress does not mean that it ceases to be a treaty and becomes an 'Act of Congress.'" (footnote omitted)).

[6] *Compare Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's London*, 543 F.3d 744, 753 (5th Cir. 2008), *vacated and reh'g granted*, 558 F.3d 399 (5th Cir. 2009), *with* Op. at [illegible] ("[T]he McCarran-Ferguson Act does not apply to *the Convention* [illegible]" (emphasis added)); Op. at [illegible] ("Because here the Convention, an implemented treaty, rather than the Convention Act, supersedes state law, the McCarran-Ferguson Act's provision that 'no Act of Congress' shall be construed to supersede state law regulating the business of insurance is inapplicable.").

[7] Despite the court's belief that it "need not and do[es] not undertake to determine the precise or technical contours of how or whether implemented non-self-executing treaty provisions become the 'Law of the Land' under the Supremacy Clause," Op. at [illegible], that is what it necessarily must do in order to justify framing its approach as an inquiry into whether the Convention itself is an "Act of Congress." *See infra* Part II.

executing treaty, in and of itself, has the power to preempt state law. The court's trail blazing holding also creates a circuit split with the Second Circuit and goes against other circuits that have concluded that a non-self-executing treaty, even if implemented by statute, may not be applied directly in U.S. courts.

A.

The court's effort to frame this case as a conflict between the Convention itself and Louisiana law puts the cart before the horse by failing to consider basic preemption doctrine before analyzing the McCarran-Ferguson Act. Fundamentally, this is a Supremacy Clause case. *See Munich Am. Reinsurance Co. v. Crawford*, 141 F.3d 585, 590 (5th Cir. 1998) ("Ordinarily, federal law preempts conflicting state law by virtue of the Supremacy Clause. The McCarran-Ferguson Act reverses that effect . . . ." (citation omitted)). From the perspective of the Supremacy Clause, Louisiana Revised Statute § 22:629[8] applies unless the Underwriters carry the burden to show that some specific source of federal law preempts it.[9] If the proposed preemptive law is a statute like the Convention Act, then the McCarran-Ferguson Act applies. If the proposed

[8] Effective January 1, 2009, § 22:629 has been renumbered § 22:868. *See* La. Rev. Stat. Ann. § 22:868 (Special Pamphlet A 2009). The provision was numbered § 22:629 at all times relevant to this suit.

[9] *See AT&T Corp. v. Public Utility Comm'n of Tex.*, 373 F.3d 641, 645 (5th Cir. 2004) ("The burden of persuasion in preemption cases lies with the party seeking annulment of the state statute.") (citing *Green v. Fund Asset Mgmt., L.P.*, 245 F.3d 214, 230 (3d Cir. 2001)).

preemptive law is the Convention itself, then the court is correct that McCarran-Ferguson does not apply. But there is still no preemption — and the district court must be affirmed — unless the Convention is actually capable of superseding § 22.629 as a matter of Supremacy Clause law. It is not.

A crucial distinction between a self-executing treaty and a non-self-executing one is that the former, but not the latter, can provide a judicially-enforceable source of preemptive law under the Supremacy Clause. Beginning with *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 315 (1829), and as recently as *Medellin v. Texas*, 552 U.S. 491 (2008), the Supreme Court has repeatedly affirmed that only self-executing treaties operate by their own force to provide a rule of decision in the courts.[6] Non-self-executing treaties, in contrast "can only be enforced pursuant to legislation to carry them into effect." *Id.* at 1356 (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)). In *Whitney*, the Supreme Court described the self-executing/non-self-executing distinction as follows:

[6] There is an argument, based on the text of the Supremacy Clause, that the Constitution should not recognize two species of treaty. After all, the clause provides that the "Constitution, and the Laws of the United States which shall be made in pursuance thereof, and *all treaties made*, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby." U.S. Const. art. VI, § 2, cl. 2 (emphasis added). But this interpretation has not prevailed.

> A treaty is primarily a contract between two or more independent nations . . . . When the stipulations are not self executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment.

124 U.S. at 194. The Court then described the Supremacy Clause implications of *self-executing* treaties having equal standing with statutes.[11] Similarly in the *Head Money Cases*, the Court distinguished purely international obligations flowing from non-self-executing treaty provisions from domestic obligations, recognized by the Supremacy Clause, flowing from self-executing treaty provisions.[12] In *Medellin*, the petitioner

[11] *See Whitney*, 124 U.S. at 194 ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either, but, if the two are inconsistent, the one last in date will control the other: *provided, always, the stipulation of the treaty on the subject is self-executing.*" (emphasis added))

[12] The Court stated the following regarding the distinction (continued...)

asserted that an International Court of Justice ruling was binding in United States courts because, "by virtue of the Supremacy Clause, the treaties requiring compliance with [the ruling] are already law of the land." 128 S.Ct. at 1356 (emphasis and internal quotation marks omitted). The Court

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(footnote continued)

between international obligations and domestic obligations recognized by courts:

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.

Edye v. Robertson (Head Money Cases), 112 U.S. 580, 598 (1884). The Court then noted, in contrast, that self-executing treaty provisions are a proper subject of the Supremacy Clause:

> But a treaty may also contain provisions which are capable of enforcement as between private parties in the courts of the country. The constitution of the United States places *such provisions as these* in the same category as other laws of congress by its declaration [in the Supremacy Clause] that "this constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land."

Id. at 598-99 (emphasis added).

rejected this argument because it found the treaties to be non-self-executing. *Id.* at 1358-61.

Therefore, treaties come in two separate and distinct types: self-executing treaties, which can undoubtedly preempt state law in a case like this, and non-self-executing treaties, which cannot. The court brushes away this key distinction, declining to hold that the Convention is self-executing, but nevertheless stating that "the *Convention*, an implemented treaty, rather than the Convention Act, supersedes state law." Op. at --- (emphasis added); *see also* Op. at --- ("[T]he McCarran-Ferguson Act does not apply to the *Convention*." (emphasis added)); Op. at --- ("[I]t is a treaty (the Convention), not an act of Congress (the Convention Act), that we construe to supersede Louisiana law.").

The court does not dispute that a non-self-executing treaty provision, of itself, has no legal force in domestic courts and therefore no preemptive force, while a self-executing provision does. It concludes, however, that upon implementation by statute, a non-self-executing treaty is promoted to the Supremacy Clause status it would have enjoyed had it been self-executing. In this view, a treaty is a treaty. Under this view, a non-self-executing treaty requires an additional step to become binding, but once that step is passed — once the treaty is implemented — it is the Supremacy Clause equivalent of a self-executing treaty. The court therefore holds to the idea that a treaty, rather than an "Act of Congress," causes the conflict in this case, repeatedly asking whether "the Convention" supersedes Louisiana law.

But that is wrong. The court points to no case holding that a non-self-executing treaty can supersede state law. *See* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 Yale J. Int'l L. 129, 149 (1999) ("[T]o the best of the author's knowledge, no U.S. court has ever held a treaty provision to be non-self-executing and then applied it directly to decide a case."). Furthermore, there is no argument that *Foster*, *Medellin*, or any similar case supports such a result. Simply put, implementing legislation – even if it fully implements a treaty – does not promote a non-self-executing treaty to the Supremacy Clause status it would have enjoyed had it been self-executing. As a matter of directly applicable domestic law, the non-self-executing treaty remains as inert as a provision of a model code, a source of content incorporated by reference.[13] As a source of law, the implementing legislation is the alpha and omega of what may constitute a rule of decision in U.S. courts. For this reason, there can be no preemption in this case without construing an Act of Congress the Convention Act rather than the treaty.

B.

Untethered to the moorings of Supreme Court precedent, scholarly consensus in this area, or case

[13] Of course, as a matter of international law, the United States is bound by its commitments, including those arising from non-self-executing treaties. *See, e.g.*, Ian Brownlie, *Principles of Public International Law* 620 (2008) (describing the principle of *pacta sunt servanda* requiring nations party to a treaty to perform their obligations in good faith).

law from other circuits, the court sets off on its course into uncharted Supremacy Clause waters. *Missouri v. Holland*, 252 U.S. 416 (1920), is the only Supreme Court holding upon which the court purports to ground its conclusion that the non-self-executing Convention is capable of preemption, and that courts should look to the treaty, rather than to the implementing legislation, to see if it is an "Act of Congress." But *Holland*'s holding on the treaty power's interplay with Congress's powers under the Necessary and Proper Clause is irrelevant to the Supremacy Clause question before this court.

What is relevant to this case is not the holding of *Holland*, but the manner in which it frames the conflict between an implemented treaty and state law prerogatives embodied in a Missouri statute. It is clear from the first sentence of *Holland* that the implementing act – not the treaty – is considered the source of the conflict. *See* 252 U.S. at 430-31 ("This is a bill in equity brought by the State of Missouri to prevent . . . the United States from attempting to enforce the Migratory Bird Treaty *Act*." (emphasis added)). The Court reasoned that the treaty was constitutional under the treaty power, and therefore the act implementing it was constitutional under the Necessary and Proper Clause. *See id.* at 432, 435. It accordingly held that the district court had correctly dismissed Missouri's complaint "on the ground that the Act of Congress is constitutional." *Id.* at 431. The source of preemptive power at issue was the implementing legislation, which the Court variously referred to as an "act," *id.*, a "statute," *id.* at 432, 435, and an "act of Congress," *id.* at 432. There is no contention or holding in *Missouri v. Holland* that a

court could apply a non-self-executing treaty, implemented or not, to supersede state law.

Not only does *Holland* not support the conclusion that implementation by statute imbues a non-self-executing treaty with preemptive abilities; leading Supreme Court cases on the self-executing/non-self-executing distinction provide no support, either. Indeed, the court does not attempt to argue that *Foster*, *Whitney*, the *Head-Money Cases*, or *Medellin*, or any case interpreting any of them, supports the premise that the non-self-executing Convention is capable of "superceding" state law under the Supremacy Clause. Considering the unusual nature of the question (and before it overrules the district court and creates a circuit split), I would expect the en banc court to devote *some* attention to the relevant case law in this area. It fails to do so.

The court also ignores the consensus of legal scholars regarding the Supremacy Clause status of implemented treaties. In direct contradiction to the holding today, the commentators overwhelmingly conclude that under current (and longstanding) law, it is only the implementing statute, not the non-self-executing treaty, that can be enforced by the courts so as to be capable of preemption.[14] *See, e.g.*, 1 Restatement (Third) of the Foreign Relations Law of the United States § 111(3) cmt. h (1986) [hereinafter Restatement] ("[S]trictly, it is the implementing legislation, rather than the agreement itself, that is

[14] This includes commentators who are critical of the present state of the law and those who are not, both of whom are represented in the citations given.

given effect as law in the United States."); Louis Henkin, *Foreign Affairs and the United States Constitution* 200 n. * (2d ed. 1996) ("Strictly, if a treaty is not self-executing it is not the treaty but the implementing legislation that is effectively 'law of the land.'"); Malvina Halberstam, *Alvarez-Machain II: The Supreme Court's Reliance on the Non-Self-Executing Declaration in the Senate Resolution Giving Advice and Consent to the International Covenant on Civil and Political Rights*, 1 J. Nat'l Security L. & Pol'y 89, 96 (2005) ("[I]t it is the statute implementing the treaty that is the supreme law of the land, rather than the treaty, as provided for by Article VI [the Supremacy Clause]."); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 Harv. L.Rev. 599, 637 (2008) ("When a treaty is non-self-executing, judges apply the implementing statute, not the treaty itself."); Jean-Marie Simon, *The Alien Tort Claims Act: Justice or Show Trials?*, 11 B.U. Int'l L.J. 1, 42 n.247 (1993) ("As a technical matter, U.S. implementing legislation does not make the treaty directly applicable in U.S. courts, it only makes the implementing legislation part of U.S. law in U.S. courts, although the implementing language may [be] identical to treaty language."); Thomas Buergenthal & Sean D. Murphy, *Public International Law in a Nutshell* 198-99 (4th ed. 2007) ("Non-self-executing treaties, however, require legislation to implement them in the United States. For such agreements, it is the implementing legislation, not the agreement itself, that becomes the rule of decision in U.S. courts."); Kathleen Patchell, 10A Hawkland UCC Series § 8:22 ("[I]f a

private law convention is implemented as a non-self-executing treaty, the convention itself will not become part of U.S. domestic law. Instead, it is the legislation, if any, passed to implement the convention that becomes part of U.S. domestic law."); Vincent G. Lvy, Note, *Enforcing International Norms in the United States after* Roper v. Simmons*: The Case of Juvenile Offenders Sentenced to Life Without Parole*, 45 Colum. J. Transnat'l L. 262, 266 n. 21 (2006) ("Indeed, the preemptive power of treaties is limited to 'self-executing' treaties the statutory provisions implementing those treaties that are not self-executing, rather than the treaties themselves, preempt U.S. state law."); *cf.* Henkin, *Foreign Affairs and the United States Constitution* at 209 n.* ("Since a non-self-executing treaty is not law for the courts of its own accord, any inconsistency between such a treaty and an Act of Congress is, as regards domestic law, an inconsistency between the two statutes.").

In its quest to give the Convention newfound preemptive abilities, the court similarly disregards case law from other circuits that have concluded that non-self-executing treaties lack preemptive force in U.S. courts. Indeed, the Second Circuit has so concluded with respect to the exact same non-self-executing treaty in this case. *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41 (2d Cir.1995).[15] Its unanimous

[15] The court contends that *Stephens* "is at least in tension" with the Second Circuit's subsequent decision in *Stephens v. National Distillers & Chem. Corp.*, 69 F.3d 1226 (2d Cir.1995) [hereinafter *National Distillers*]. This is not so, as the cases are easily distinguished. As the court notes, *National Distillers* held that the statute at issue in the case, the Federal Sovereign Immunities Act (FSIA), codified international law that was (continued...)

panel did not find the issue difficult. The question presented was whether "under the Supremacy Clause the Convention supersedes the Kentucky Liquidation Act." *Id.* at 45. The court only needed to note that "the Convention is not self-executing" and consider the basic doctrine of *Foster* in order to conclude that "[t]he Convention itself is simply inapplicable." *Id.* The Third Circuit's decision in *Suter v. Munich Reinsurance Co.*, 223 F.3d 150 (3d Cir.2000), further confirms that the Convention is simply inapplicable as a source of preemptive law in the courts. As in *Stephens*, the court in *Suter* faced essentially the same issue we face. Although it described the reinsurance contracts at issue as

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already a part of federal common law at the time Congress passed the McCarran-Ferguson Act. *See id.* at 1234 ("But it was not an 'act of Congress' that superseded [state] insurance law. International law, accepted by federal common law, had already done that before the FSIA came into being."); *see also Verlinden B.V. v. C. Bank of Nig.*, 461 U.S. 480, 488 (1983) ("For the most part, [FSIA] codifies, as a matter of federal law, the restrictive theory of sovereign immunity."). McCarran-Ferguson was inapplicable because it would not require reverse-preemption of the identical federal common law rules that would have been in force had the FSIA never been enacted. *See National Distillers*, 69 F.3d at 1234. That unique circumstance is not present in this case. Furthermore, the FSIA specifies that it provides the exclusive means of suing a foreign sovereign in American courts. *See* 28 U.S.C. §§ 1604-1607 (foreign states are immune from the jurisdiction of American courts except as provided in §§ 1605-1607); *see Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004) (FSIA is "comprehensive statute containing a 'set of legal standards governing claims of immunity in every civil action against a foreign state . . . .'" (quoting *Verlinden*, 461 U.S. at 488)). By contrast, the Convention Act does not contain, nor has the Supreme Court found, a similar statement of exclusivity.

"includ[ing] arbitration clauses governed by the . . . Convention," it framed the preemption issue in terms of whether there was a conflict between "the Convention Act" and an allegedly contrary New Jersey statute. *See id.* at 152, 160-62.[16] There was no suggestion that the Convention itself could supersede the statute.

The notion that non-self-executing treaties are inapplicable in domestic courts finds support in other circuits as well. In *Hopson v. Kreps*, the Ninth Circuit concluded in no uncertain terms that "[t]he issue in any legal action concerning a statute implementing a treaty is the intended meaning of the terms of the statute." 622 F.2d 1375, 1380 (9th Cir.1980). Rather than being the star of the jurisprudential show, as the majority contends, the non-self-executing treaty takes a back seat to the implementing statute: it may be "relevant [in U.S. Courts] insofar as it may aid in the proper construction of the statute," but it "has no independent significance in resolving such issues."[17]

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[16] The court held there was no conflict because in fact, the New Jersey statute did not preclude arbitration (or removal to federal court) pursuant to the Convention Act. *See Suter*, 223 F.3d at 161 ("[W]e find no potential friction between the Liquidation Act and having this controversy decided by an arbitrator.").

[17] Even the proposition that a non-self-executing treaty could be relevant as an interpretive aid to resolve ambiguities in an implementing act is contested. *See, e.g., Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 880 (D.C.Cir.2006) (Kavanaugh, J., concurring) (finding "little justification for a court to put a thumb on the scale in favor of a non-self-executing treaty when interpreting a statute" because such treaties "have no legal status in American courts.").

See id. Likewise, when the D.C. Circuit addressed the interpretation of a non-self-executing treaty, Judge Kavanaugh noted in concurrence that "[s]trictly, it is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States. That is true even when a non-self-executing agreement is 'enacted' by, or incorporated in, implementing legislation." *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 879 (D.C.Cir.2006) (Kavanaugh, J., concurring) (quoting Restatement § 111 cmt. h).

Although the court cites cases from our circuit purporting to apply the Convention rather than the Convention Act,[18] these cases stand for no such proposition. They amount to nothing more than instances of imprecise language used in contexts where the distinction was of no consequence.[19] In

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[18] *See Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 902-03 (5th Cir.2005) ("It goes without saying that, upon the United States signing a treaty and Congress adopting enabling legislation, the treaty becomes the supreme law of the land."); *McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 120 F.3d 583, 586 (5th Cir.1997) (refusing to decide "whether *the Convention* preempts La. R.S. 22:629" (emphasis added)); *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1145 (5th Cir.1985) (holding that if an arbitration agreement qualifies, "*the Convention* requires district courts to order arbitration" (emphasis added)).

[19] In *Lim*, for example, employment contracts, not insurance agreements, were at issue; the McCarran-Ferguson Act was therefore not triggered and state law was preempted by federal law-as a formal matter, by the Convention *Act* rather than the Convention itself, but it made no difference in that case. 404 F.3d at 900-01. The formal status of the Convention was similarly irrelevant in *Sedco*, and the McCarran-Ferguson Act not triggered. 767 F.2d at 1144-45. Although *McDermott* (continued...)

the typical case, the formal distinction between the Convention and the Convention Act will not matter. When courts confront an *implemented,* non-self-executing treaty, the implementing act has preemptive force under the Supremacy clause rendering it irrelevant whether the treaty does as well. Where the distinction is not material, it is just less cumbersome to speak of a party's rights under a particular section of the Convention (which contains the specifics) than under the Convention Act (which merely enacts the Convention).[20] This is comparable

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(footnote continued)

involved the same Louisiana insurance statute at issue here, it did not address the Convention/Convention Act distinction because it held that the policy was not delivered in Louisiana, and thus that Louisiana's arbitration voidance clause was inapplicable. 120 F.3d at 586.

[20] The Restatement acknowledges the practice of referring to a non-self-executing treaty, for convenience's sake, as applicable law when actually it is not. In fact, the Restatement does so itself. Section 111(3) states the basic rule regarding non-self-executing treaties:

> Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that any "non-self-executing" agreement will not be given effect as law in the absence of necessary implementation.

At first glance, this appears to suggest that a non-self-executing agreement will "be given effect as law" upon implementation. Comment h, however, makes clear this is not the case:

> Under Subsection (3), strictly, it is the implementing legislation, rather than the [non-self-executing] agreement itself, that is given effect as law in the United States. That is true

(continued...)

to our occasional practice of applying the Uniform Commercial Code as if it were enforceable law, when we really mean to refer to state statutes enacting the uniform provisions. *See, e.g., First United Fin. Corp. v. Specialty Oil Co.*, 5 F.3d 944, 946 n.2 (5th Cir.1993) ("[B]ecause Louisiana has adopted the UCC provisions relevant herein, all sections will hereafter be cited to the UCC rather than to the specific Louisiana statute."). In the instant case, however, the distinction is not merely tangential but dispositive: the McCarran-Ferguson Act applies only to Acts of Congress, not to treaties.[21]

(footnote continued)

> even when a non-self-executing agreement is "enacted" by, or incorporated in, implementing legislation.

Unlike the cases that the court cites, the present case is the rare one that requires us to be "strict" in distinguishing between the treaty and the act.

[21] The court cites language from the Convention Act itself indicating a "proceeding falling under the convention shall be deemed to arise under the laws *and* treaties of the United States," Op. at -- (quoting 9 U.S.C. § 203) (emphasis added), implying that Congress thought the Convention Act could apply directly. This argument does not undermine the consensus that non-self-executing treaties lack preemptive force in the courts. At most, this language could conceivably be relevant to determining whether Congress thought the treaty was self-executing. But assuming (as the court does) that it is not self-executing, Congress simply lacks the power to alter, by statute, constitutional decisions such as *Foster*, *Whitney*, and the *Head-Money Cases*, which indicate that non-self-executing treaties are not directly enforceable by the courts.

II.

Perhaps the court today does not really mean to cut a new path through Supremacy Clause territory to endow non-self-executing treaties with heretofore undiscovered preemptive powers. But that is what it must do in order to justify framing its approach as an inquiry into whether the Convention itself is an "Act of Congress."[22] The alternative would be a sort of legal alchemy, in which the court bestows on the Convention Act the beneficial properties of a statute (such as the power to carry an inert treaty into execution and preempt state law), but not its drawbacks (such as the need to live by rules like the McCarran-Ferguson Act that Congress has prescribed for statutes). This is plainly wrong. Because a non-self-executing treaty cannot preempt state law, the court cannot analyze the ineffectual treaty rather than the implementing legislation to determine the reverse-preemptive effects of the McCarran-Ferguson Act.

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[22] Thus, it is no surprise to find the court inferring from our precedents that "implemented provisions of a non self executing treaty can themselves be given effect by the courts as federal law," Op. at -- & n. 57, concluding that "it is by reference to the Convention that we have a command-a judicially enforceable remedy-that we 'supersede' Louisiana law," Op. at --, recognizing that "[i]mplementing legislation that does not conflict with or override a treaty does not replace or displace that treaty," Op. at --, and deciding what it means for preemptive law to have "as its source an implemented non-self-executing treaty," Op. at --.

A.

Two sources of law are here in conflict. The first source of law is Louisiana Revised Statute § 22:629, which bars the use of arbitration clauses in insurance disputes.[23] The Louisiana statute would normally be subject to the ordinary rules of preemption, except that it falls within purview of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, which bars implied federal statutory preemption of state insurance law and permits state insurance laws to reverse-preempt inconsistent federal statutes. Specifically, Congress declared in the McCarran-Ferguson Act that it intended to create a default rule preserving a state-by-state scheme for regulating insurance and providing that congressional silence on insurance regulation must not be interpreted to preempt state law. § 1011 ("Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."). The provision of the McCarran-Ferguson Act at issue in this case provides:

> No *Act of Congress* shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . .

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[23] *Doucet v. Dental Health Plans Mgmt. Corp.*, 412 So.2d 1383, 1384 (La.1982) (holding that § 22:629 bars arbitration clauses in the insurance law context).

> unless such Act specifically relates to the business of insurance . . . .

§ 1012(b) (emphasis added). With respect to "Acts of Congress," the McCarran-Ferguson Act "impos[es] what is, in effect, a clear-statement rule that state laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise."[24] *U.S. Dep't of the Treasury v.*

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[24] Congress has prescribed rules of statutory construction in other statutes as well. *See, e.g.*, 50 U.S.C. § 1547(a) (War Powers Resolution) (imposing clear statement rule for legislation authorizing introduction of United States Armed Forces into hostilities). Furthermore, the formal treaty/statute distinction the court elides today is essential in a number of other contexts. *See, e.g.*, 18 U.S.C. § 4001(a) (Non-Detention Act) (requiring that any "imprison[ment] or detention]" by the United States of an American citizen be effected pursuant to an "*Act of Congress*"; a treaty is insufficient (emphasis added)), 28 U.S.C. § 1350 (Alien Tort Statute) ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a *treaty* of the United States," but not an Act of Congress) (emphasis added), War Powers Resolution, 50 U.S.C. § 1547(a)(2) (stating that specific authorization for the introduction of United States Armed Forces into hostilities may not be inferred from a treaty alone, but instead requires implementing legislation); Curtis A. Bradley & Jack L. Goldsmith, *Foreign Relations Law* 396 (2d ed. 2006) ("It is generally accepted that treaties may not by themselves create domestic criminal liability in the United States"; statutes are required); 1 Restatement (Third) of Foreign Relations Law of the United States § 111, cmt. i (1987) [hereinafter Restatement] ("It has been commonly assumed that an international agreement [e.g., a treaty] cannot itself bring the United States into a state of war."); *Edwards v. Carter*, 580 F.2d 1055, 1058 (D.C.Cir.1978) ("Thus, [by virtue of U.S. Const. art. I, § 9, cl. 7] the expenditure of funds by the United States cannot be accomplished by self-executing treaty; implementing legislation appropriating such funds is

(continued...)

Fabe, 508 U.S. 491, 507 (1993). Thus, at least as an initial matter, this provision of Louisiana law is protected by the McCarran-Ferguson Act.

The court errs on the question whether the second source of law in this case constitutes an "Act of Congress." If it does, then like all Acts of Congress that do not "specifically relate[ ] to the business of insurance," it is subject to reverse-preemption by state law under McCarran-Ferguson; if it is not an Act of Congress but rather some other source of federal law, like a self-executing treaty, then McCarran-Ferguson does not apply, and the Louisiana law would be preempted by straightforward application of the Supremacy Clause.

The Convention, as a non-self-executing treaty, cannot itself provide the rule of decision here, so the Convention Act must be the second source of law.[25]

(footnote continued)

indispensable. Similarly, the constitutional mandate that 'all Bills for raising Revenue shall originate in the House of Representatives' [U.S. Const. art. I, § 7, cl. 1] appears, by reason of the restrictive language used, to prohibit the use of the treaty power to impose taxes."). "The treaty power does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, 'to make Treaties.'" *United States v. Lara*, 541 U.S. 193, 201 (2004) (quoting U.S. Const., art. II, § 2, cl. 2).

[25] Once we remove the Convention as a possible source of preemption, then this case is no different from *Munich American Reinsurance Co. v. Crawford*, 141 F.3d 585 (5th Cir.1998). In *Munich*, the court looked to the Federal Arbitration Act as the source of federal law that conflicted with an Oklahoma law governing insurance delinquency proceedings, and found that the Oklahoma Law reverse-

(continued...)

This was the conclusion reached by the Second Circuit in *Stephens*. *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41 (2d Cir.1995). In determining whether Louisiana state law was preempted under the McCarran-Ferguson Act, the court looked to the implementing statute, not the treaty. Unlike the court today, the *Stephens* court found that "[t]he Convention itself . . . simply inapplicable in this instance" as the implementing legislation was the federal law of consequence. *Id.* Likewise, this court should have looked to the statute, rather than the treaty, to determine if Louisiana law had been preempted by an "Act of Congress" as required by McCarran-Ferguson.

B.

The court justifies its decision to look to the Convention rather than the Convention Act on the ground that the Convention Act implements the Convention largely by reference, as opposed to setting out the Convention provisions within the text of the Act.[26] Op. at --. The court proposes that "the Convention Act does not . . . operate without reference to the contents of the Convention." *Id.* Because a court applying the Convention Act must

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(footnote continued)

preempted the Federal Arbitration Act under the McCarranFerguson Act. *Id.* at 596. If the Convention Act is all that is left to preempt, it is reverse preempted just as the FAA was in the previous case.

[26] Congress incorporated the substance of the treaty in the implementing Act of Congress largely by reference. *See, e.g.*, 9 U.S.C. § 201 ("The Convention . . . shall be enforced in United States courts in accordance with this chapter.").

also consult a reference copy of the Convention to ascertain the conflict with Revised Statute § 22:629, the court argues that it is the Convention, rather than the Act, that is "construed" under the McCarran-Ferguson Act. This supposedly insulates the preemptive provisions from McCarran-Ferguson, which reaches only statutes, not treaties.

This argument is essentially a play on words, which wrenches the word "construe" from the verb phrase in which it appears in the statute:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

15 U.S.C. § 1012(b). The relevant phrase is "construe[ ] to invalidate, impair, or supersede." Thus, "construe" does not merely mean to refer to the text for content. The plain meaning of "construe . . . to supersede any law enacted by any State" is to give preemptive force, to *apply* the source of law in question rather than state law. Accordingly, to merely "operate with [ ] reference to the contents" of the Convention – to merely have a copy handy and refer to it – is not to "construe" the Convention in the McCarran-Ferguson sense.[27]

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[27] Our cases further confirm that the phrase "construed to invalidate, impair, or supersede" entails *applying* federal law to invalidate, impair, or supersede state law. *See Miller v. Nat'l Fid. Life Ins. Co.*, 588 F.2d 185, 186-87 (5th Cir.1979) ("The McCarran-Ferguson Act precludes the *application* of federal (continued...)

The contention that we are not truly "construing" the Convention Act because we must resort to the language of the Convention to do so is logically unsupportable and foreign to the case law. The other circuits to address this question have discussed the interaction between a non-self-executing treaty and its implementing legislation to varying degrees, depending in part on the relevance of the distinction to the case's outcome. None have suggested that the Convention Act's failure to cut-and-paste the language of the treaty into the statute somehow prevents the statute from being an "Act of Congress," capable of being "construed." *See Missouri v. Holland*, 252 U.S. 416, 424, 430, 431, 432, 435, (1920) (discussing the source of law at issue as an "Act of Congress," an "act of Congress," an "act," and a "statute," and addressing solely the question whether the Act of Congress preempted state law, not whether the treaty itself did); *Stephens*, 66 F.3d at 45 (holding "[t]he Convention itself . . . simply inapplicable in this instance"); *Suter v. Munich*

(footnote continued)

laws if, as a result, laws of a state regulating insurance would be invalidated, impaired, or superseded." (emphasis added)); *Am. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 708 (5th Cir.2002) ("Appellants fail to identify any statute that would be impaired, invalidated, or superseded by the *application* of the FAA") (citing *Miller*, 588 F.2d at 187) (emphasis added); *Crawford*, 141 F.3d at 594 ("We must now consider whether the [federal statute] *operates* to 'invalidate, supersede, or impair' [the state statute]." (emphasis added)); *accord Humana Inc. v. Forsyth*, 525 U.S. 299, 307 (1999) ("This case . . . turns on the question: Would RICO's *application* to the employee beneficiaries' claims at issue invalidate, impair, or supersede Nevada's laws governing insurance?" (emphasis added)).

Reinsurance Co., 223 F.3d 150, 160-62 (2d Cir.2000) (analyzing the Convention Act, rather than the Convention itself, as the source of law at issue); *Hopson v. Kreps*, 622 F.2d 1375, 1380 (9th Cir.1980) (although it "is relevant insofar as it may aid in the proper construction of the statute," a non-self-executing "treaty has no independent significance in resolving such issues.").

Commentators also agree that regardless of whether one must refer to a separate treaty text, or whether instead that text is set out in the implementing statute itself, it is the statute, not the treaty, that courts apply. *See, e.g.*, Carlos Manuel Vázquez, *The Separation of Powers as a Safeguard of Nationalism*, 83 Notre Dame L. Rev. 1601, 1617 (2008) ("When a court gives effect to a treaty because it is instructed to do so by a statute, it is applying the statute, not the treaty."); Tim Wu, *Treaties' Domains*, 93 Va. L. Rev. 571, 588 (2007) ("When Congress implements a treaty through a statute, the statutory regime completely replaces the treaty as a basis for direct enforcement. That is, judges do not return to the original text of the treaty as a law they can enforce directly.").

In the end the court does not see the "operate with[ ] reference to the contents" theory all the way through. The court does not merely look to the Convention in order to fill gaps in the language of the Convention Act. Rather, the opinion makes clear that the court means to apply the Convention directly, as if it had preemptive force. For the reasons given in Part I above, it is not possible to "construe [the Convention] to supersede" *anything*, because the Convention is incapable of providing a

rule of decision in a U.S. court. Louisiana law governs unless some applicable source of federal law can preempt. The treaty cannot do so. Therefore, the only remaining candidate is the Convention Act.

III.

Only a single statutory interpretation question remains: *is the Convention Act an "Act of Congress" within the meaning of the McCarran-Ferguson Act?* We can answer this question by setting forth the opening words of the Act itself:

> UNITED STATES STATUTES AT LARGE
>
> 91ST **CONGRESS**-2ND SESSION
>
> Convening January 19, 1970
>
> An **Act**
>
> To implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Pub.L. No. 91-368, 84 Stat. 692 (1970) (emphasis added).

This is an Act of Congress. The legislation is plainly labeled as an Act of Congress, and no ambiguity on this point is cited by the court or by the parties. "The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *BedRoc Ltd. v. United States,* 541 U.S. 176, 183 (2004) (quoting *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992)). "[O]ur inquiry begins with the statutory text, *and ends there as well if the text is unambiguous.*" *Id.* (citing cases) (emphasis added). In addition, as discussed at length in Part I, the

Supreme Court recognizes the implementing legislation of a non-self-executing treaty as an Act of Congress. *Missouri v. Holland*, 252 U.S. 416, 430, 431, 432, 435 (1920). Therefore, the court's exercise in statutory interpretation should have ended with the plain language of the statute, and its foray into the realm of policy considerations is improper.

Because the court is convinced that the straightforward interpretation of the words "Act of Congress," would produce an "untenable" result, the court's analysis veers off course into a fruitless search for Congress's true intent. As a result, the court ends up supplanting the plain meaning of the unambiguous term "Act of Congress" with a strained interpretation aimed at protecting important federal policies.

First, the court resorts to speculation about what Congress must have had in mind when it included the words "Act of Congress" in the reverse-preemption provision of the McCarran-Ferguson Act. The court concludes that "there is no apparent reason . . . why Congress would have chosen to distinguish in the McCarran-Ferguson Act between treaties that are self-executing and those that are not self-executing but have been implemented." Op. at --. It therefore considers it "unlikely" that in passing McCarran-Ferguson, Congress "intended any future treaty implemented by an Act of Congress to be abrogated to the extent that the treaty conflicted . . . with a state law regulating . . . insurance if Congress's implementing legislation did not

expressly save the treaty from reverse-preemption." Op. at --.[28]

This interpretation contradicts the plain language of the McCarran-Ferguson Act. In the Act, Congress prescribed a clear-statement rule for federal statutes affecting the business of insurance: uncertain provisions are to be construed *not* to preempt state insurance law. *See generally U.S. Dep't. of Treasury v. Fabe*, 508 U.S. 491, 507 (1993). In fact, Congress explicitly determined that "the continued regulation and taxation by the several States of the business of insurance is in the public interest." § 1011. It is possible that Congress intended this policy judgment to control the interpretation of Acts of Congress generally, whether or not they implemented treaties. It is also possible that Congress never considered whether Acts of Congress implementing treaties ought to be subject to the clear-statement rule of McCarran-Ferguson. It does not matter which, if

[28] There is a vague suggestion in these passages that the court still holds to the panel's conception of the treaty and its implementing legislation as somehow conglomerated. Because no such chimera exists in our law, it is reasonable to assume that Congress did not have it in mind when it passed the McCarranFerguson Act. However, this is irrelevant to statutory interpretation because we are to look to what Congress said, not to what Congress may or may not have had in mind.

Furthermore, any theory based on a hybridized treaty-statute loses track of the basic character of this case. It is a preemption case, and preemption requires a source of federal law capable of displacing state law. If the Convention cannot do so, and the McCarran-Ferguson Act prevents the Convention Act from doing so, then no hybrid of the two can do so.

either, of these narratives is correct. Such speculation has no place when we interpret a statute to say what it means and mean what it says. *BedRoc*, 541 U.S. at 183; *see also Green v. Biddle*, 8 Wheat. 1, 21 U.S. 1, 89-90 ("[W]here the words of a law, treaty, or contract, have a plain and obvious meaning, all construction, in hostility with such meaning, is excluded. This is a maxim of law, and a dictate of common sense."). There is a lively debate in the judiciary and the legal academy over the universe of interpretive methods properly available to a court where the text of a statute is unclear, but that debate is irrelevant here. How much clearer than "No Act of Congress" can Congress be?

The court contends that reading the words "Act of Congress" to include the Convention Act is "untenable," and states that it does "not consider it reasonable" to embrace such a reading of the statute. Op. at --. Yet there is no citation to any rule of construction that would make these judgments relevant to the interpretive task, as policy-based interpretive techniques have no place in the court's analysis where the language of the statute is clear.[29]

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[29] The court acknowledges that "the starting point for interpreting a statute is the language of the statute itself." Op. at -- & n. 9 (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). It cites no further interpretive rules in support of its reasoning, other than citing *United States v. Percheman*, 32 U.S. 51, 89, 7 Pet. 51 (1833) for the proposition that "[t]he understanding of the article [of a treaty] must enter into our construction of the acts of [C]ongress on the subject." *Percheman* is at most relevant to interpreting the Convention Act. It has no bearing on the interpretation of the phrase "Act of Congress" as it appears in

(continued...)

Where the statutory text is unambiguous, "there is neither need *nor warrant* to look elsewhere." *Am. Trucking Ass'ns, Inc. v. ICC*, 659 F.2d 452, 459 (5th Cir. Unit A Oct.1981) (emphasis added). "A court should depart from the official text of the statute and seek extrinsic aids to its meaning *only if* the language is not clear or if apparent clarity of language leads to absurdity of result when applied." *Id.* (emphasis added and citation omitted). In light of such clear directives, the court's approach is aberrant.

In addition to the court's improper inquiry into what Congress intended when it wrote the unambiguous words "Act of Congress," the court expounds for some length – indeed for an entire section – upon the federal policies protected by its interpretation. *See* Op. at -- ("Our conclusion that referral to arbitration is proper in this case is bolstered by the congressionally sanctioned national policy favoring arbitration of international

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(footnote continued)

the McCarranFerguson Act, which is not an implementing act for a treaty.

Neither the parties nor the court contends that the canon of constitutional avoidance, *see Ashwander v. TVA*, 297 U.S. 288, 345-46 (1936) (Brandeis, J., concurring), or the canon of avoiding absurd results, *see United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940), applies here. The unambiguous nature of Congress's language in the McCarran-Ferguson Act likewise precludes application of the *Charming Betsy* canon, which favors interpretations of unclear statutes that help the United States meet its treaty obligations over those that do not. *Murray v. Schooner Charming Betsy*, 6. U.S. (2 Cranch) 64 (1804).

commercial agreements."). But in light of a clearly worded statute, this factor cannot support the weight that the court's analysis forces it to bear. Indeed, even if such policy considerations were relevant to the interpretation of an unambiguous statute, and they are not, the court's analysis barely acknowledges the state interest that was significant enough to give rise to the rare reverse-preempting provision of the McCarran-Ferguson Act in the first place.[30]

IV.

In summary, I would follow the holding of the Second Circuit (the only circuit to have squarely decided this question) in *Stephens*. In a domestic court, a treaty that Congress enacts is not law itself, and in fact it is the statute that counts and the statute amounts to a standard congressional act.

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[30] Congress, in enacting McCarran-Ferguson, explicitly stated that "continued regulation and taxation by the several States of the business of insurance is in the public interest." 15 U.S.C. § 1011. McCarran-Ferguson was a response to a Supreme Court decision interpreting the Sherman Act to apply to the business of insurance, "thereby interfering with state regulation of insurance in . . . unanticipated ways." *Barnett Bank of Marion Co., N.A. v. Nelson*, 517 U.S. 25, 40 (1996). Congress therefore "moved quickly" to enact the statute "to restore the *supremacy of the States* in the realm of insurance regulation" by protecting state regulation from inadvertent Congressional interference. *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 500 (1993) (emphasis added). Recognizing this strong state interest, the Supreme Court has observed that "[o]bviously, Congress's purpose [in enacting the statute] was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946).

I would hold that:

1. The non-self-executing Convention[31] cannot itself

[31] We cannot hold that the treaty is self-executing because no party asks us to do that. Our en banc holdings establish that we reach only the issues properly brought to the panel and the court en banc. *United States v. Brace*, 145 F.3d 247, 255-61 (5th Cir.1998) (en banc) ("It bears repeating-indeed, cannot be overemphasized-that we do not address issues not presented to us."); *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 280 n. 32 (5th Cir.2005) (en banc) ("In its en banc brief, Louisiana mentioned a relatedness challenge to § 2000d-7, but that argument was not presented to the panel, and Louisiana's en banc brief fails to develop it beyond a bare assertion. Thus, Louisiana has waived its relatedness challenge."), *Atwater v. City of Lago Vista*, 195 F.3d 242, 245 n. 3 (5th Cir.1999) (en banc), *aff'd*, 532 U.S. 318 (2001); *United States v. Johnson*, 718 F.2d 1317, 1325 n. 23 (5th Cir.1983) (en banc). The Underwriters failed to properly preserve a self-execution argument at both the panel and en banc stages.

At the panel stage, the Underwriters failed to press for such a holding, mentioning the argument only in a footnote of their merits brief. Appellant's Brief 33 n. 17; *see Davis v. Maggio*, 706 F.2d 568, 571 (5th Cir.1983) ("Claims not pressed on appeal are deemed abandoned."); *Miller v. Tex. Tech Univ. Health Sci. Ctr.*, 421 F.3d 342, 348-49 (5th Cir.2005) (en banc) (taking an en banc brief's "bare assertion" as forfeiture); *F.D.I.C. v. Mijalis*, 15 F.3d 1314, 1326-27 (5th Cir.1994) ("intimat[ing]" is not "press[ing]"); *see also Blumberg v. HCA Mgmt. Co.*, 848 F.2d 642, 646 (5th Cir.1988) ("[W]e have repeatedly held that we will not consider alleged errors raised only [in the reply brief]."). Indeed, as the court today notes, the Underwriters' briefs addressed the self-execution argument without "any depth." Op. at --. And of course, whether the now-vacated panel opinion addressed the argument is of no consequence to the court's determination at this stage. *See Brace*, 145 F.3d at 256.

At the en banc stage, the Underwriters explicitly waived their self-execution argument. The court recognizes that "[t]he (continued...)

(footnote continued)

Underwriters addressed whether the Convention is self-executing *only in briefs to the panel*." Op. at -- (emphasis added). But more importantly, the Underwriters' en banc reply brief actually disclaims any desire to have the court hold that the treaty is self-executing:

> The question before the Court is not whether the Convention is self-executing or what preemptive effect, if any, an unimplemented non-self-executing treaty would have on a conflicting state law. The question is what preemptive effect a later-in-time, implemented treaty has on conflicting state law.

Appellant's *En Banc* Reply Brief 6-7. If we take the concurrence's suggestion and look to "the section heading preceding that language," Concurrence at -- n. 2, the inference is no different, for there again the Underwriters present the treaty as non-self-executing: "LSAT Avoids Answering the Question Posed by the Panel-Why Should an *Implemented* Non-Self Executing Treaty Be Treated Any Differently Than a Self-Executing Treaty?" Appellant's *En Banc* Reply Brief 6.

The concurrence urges us to look at LSAT's en banc brief to determine whether or not the Underwriters presented the issue. Concurrence at -- n. 2. Rather than look to LSAT's brief for the Underwriters' argument, we could have just asked the Underwriters what they had briefed. And, in fact, we did:

> Q: That the clause is self-executing, section three, is that somewhere in your brief?
>
> A: In the *en banc* briefs, we did not go into that issue, Your Honor, no we did not.

Recording of Oral Argument, *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's London*, -- F.3d -- (5th Cir.2009) (en banc), http://www.ca5.uscourts.gov/OralArgRecordings/06/06-30262_5-21-2009.wma.

Accordingly, we cannot reverse the trial court by holding that the treaty is self-executing because the Underwriters first

(continued...)

provide a rule of decision for U.S. courts; only its implementing legislation is capable preempting state law.

2. The Convention Act implementing the Convention is an Act of Congress that does not "specifically relate[ ] to the business of insurance";

3. The McCarran-Ferguson Act provides that "No Act of Congress" preempts state law unless the Act of Congress "specifically relates to the business of insurance";

4. The Louisiana statute is "a[ ] law enacted by a[ ] State for the purpose of regulating the business of insurance" that the Convention Act would "invalidate, impair, or supersede";

5. The Convention Act is therefore reverse-preempted by the Louisiana statute by operation of the McCarran-Ferguson Act; and

6. Accordingly, the district court correctly ruled that no federal law prevents Louisiana Revised Statute § 22:629 from applying in this case.

* * * * * *

The court today has declined the opportunity to align itself with the Second Circuit and the Supreme Court's jurisprudence in this area. It has muddied the waters of our statutory interpretation jurisprudence, by reasoning on an ad hoc basis from

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(footnote continued)

forfeited and then waived the argument, and "it is not for us to decide which issues should be presented, or to otherwise try the case for the parties." *Brace*, 145 F.3d at 256.

its own conception of what is "reasonable," or "[l]ikely" for Congress to have intended, rather than looking to what Congress said. Simultaneously, with little doctrinal discussion, it has applied a non-self-executing treaty as domestic, preemptive law in an unprecedented manner. As a result, "at least until our superiors speak, we leave the state of the law in [Supremacy] Clause purgatory." *Green v. Haskell Co. Bd. of Comm'rs*, 574 F.3d 1235, 1245 (10th Cir.2009) (Gorsuch, J., dissenting from denial of rehearing en banc) (citation and internal quotation marks omitted).

Respectfully, I dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-30262

SAFETY NATIONAL CASUALTY CORPORATION,

Plaintiff-Appellee,

LOUISIANA SAFETY ASSOCIATION OF TIMBERMEN – SELF INSURERS FUND,

Intervenor Plaintiff-Appellee,

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON; ET AL.,

Defendants

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON,

Defendant-Appellant,

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON,

Plaintiff-Appellant,

v.

SAFETY NATIONAL CASUALTY CORPORATION; LOUSIANA SAFETY ASSOCIATION OF TIMBERMEN,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Louisiana

Argued and Submitted June 9, 2008–
San Francisco, California

Filed Sept. 29, 2008

Before KING, DeMOSS and OWEN, Circuit Judges.

OWEN, Circuit Judge:

The basis for this interlocutory appeal pursuant to 28 U.S.C. § 1292(b) is the district court's denial of a motion to compel arbitration of a contractual dispute among three insurers. The district court concluded that because of the McCarran-Ferguson Act,[1] the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention)[2] and federal legislation providing that the Convention shall be enforced in United States courts, found in 9 U.S.C. §§ 201-208, are reverse preempted by LA.REV.STAT. ANN. § 22:629. We disagree.

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[1] 15 U.S.C. § 1011.

[2] June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

I

Louisiana Safety Association of Timbermen-Self Insurers Fund (LSAT) is, as its name implies, a self-insurance fund operating in Louisiana. It provided workers' compensation insurance for its members. Certain Underwriters at Lloyd's, London (the Underwriters) provided excess insurance to LSAT by reinsuring claims for occupational-injury occurrences that exceeded the amount of LSAT's self-insurance retention. Each reinsurance agreement contained an arbitration provision.

Safety National Casualty Corporation (Safety National) also provides excess workers' compensation co erage and alleges that in a loss portfolio transfer agreement, LSAT assigned its rights under the reinsurance agreements with the Underwriters to Safety National. The Underwriters refused to recognize the assignment, contending that LSAT's obligations were strictly personal and therefore non-assignable.

Safety National sued the Underwriters in federal district court. The Underwriters filed an unopposed motion to stay proceedings and compel arbitration. The district court initially granted that motion and stayed the lawsuit.

The Underwriters initiated arbitration proceedings with Safety National and LSAT; however, the parties could not agree upon how arbitrators were to be selected. The Underwriters then filed a motion to lift the stay in order to join LSAT as a party in the district court and to compel arbitration to resolve the dispute about how to compose the arbitration panel. In response, LSAT

moved to intervene, lift the stay, and quash arbitration. LSAT asserted that the arbitration agreements were unenforceable under Louisiana law. While those motions were pending, the Underwriters filed a separate action against Safety National and LSAT seeking recovery of unpaid premiums under the policies. The district court consolidated the two actions.

The district court ultimately reconsidered its initial decision and granted LSAT's motion to quash arbitration. The district court concluded that although the Convention would otherwise require arbitration, a Louisiana statute[3] that has been interpreted to prohibit arbitration agreements in insurance contracts was controlling. The district court reasoned that since that statute had "the purpose of regulating the business of insurance" within the meaning of the McCarran-Ferguson Act, the Louisiana statute reverse preempted the Convention.[4] The district court subsequently certified that its order embodying these rulings involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal pursuant to 28 U.S.C.

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[3] La. Rev. Stat. Ann. § 22:629.

[4] *See generally U.S. Dept. of Treasury v. Fabe*, 508 U.S. 491, 507 (1993) ("Ordinarily, a federal law supersedes any inconsistent state law. The first clause of [§ 1012(b)] reverses this by imposing what is, in effect, a clear statement rule, a rule that state laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise.").

§ 1292(b) may materially advance the termination of the litigation. We granted leave to appeal.

II

The Louisiana statute at issue provides:

> A. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state . . . shall contain any condition, stipulation, or agreement:
>
> . . . .
>
> (2) Depriving the courts of this state of the jurisdiction of action against the insurer.
>
> . . . .
>
> C. Any such condition, stipulation, or agreement in violation of this Section shall be void, but such voiding shall not affect the validity of the other provisions of the contract.[5]

Although it is not clear from this provision's text that arbitration agreements are voided, Louisiana courts have held that such agreements are unenforceable because of this statute.[6]

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[5] La. Rev. Stat. Ann. § 22:629.

[6] *See Doucet v. Dental Health Plans Mgmt. Corp.*, 412 So.2d 1383, 1384 (La.1982) ("Classification of the contract at issue as an insurance contract renders the arbitration provisions of that contract unenforceable under R.S. 22:629."); *see also McDermott Int'l, Inc. v. Lloyds Underwriters of London*, 120 F.3d 583, 586 (continued...)

The McCarran-Ferguson Act provides that "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."[7] The Act further provides, "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . ."[8]

The Convention does not specifically relate to the business of insurance. Nor do Underwriters challenge the district courts conclusion that La. Rev. Stat. Ann. § 22:629, when applied to disputes arising under reinsurance agreements between insurers, regulates the business of insurance within the

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(footnote continued)

(5th Cir.1997) ("Compulsory arbitration clauses in certain insurance contracts are unenforceable in Louisiana because of La.R.S. 22:629. . . ."); *W. of Eng. Ship Owners Mut. Ins. Ass'n (Luxembourg) v. Am. Marine Corp.*, 981 F.2d 749, 750 n.5 (5th Cir.1993) ("Louisiana has prohibited arbitration clauses in insurance policies" (citing La. Rev. Code Ann. § 22:629; *Doucet*, 412 So.2d at 1384)).

[7] 15 U.S.C. § 1011.

[8] *Id.* § 1012(b); *see also id.* § 1101; *Fabe*, 508 U.S. at 507 (explaining that the first clause of [§ 1012(b)] mandates that state statutes "regulating the business of insurance" do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise).

meaning of the McCarran-Ferguson Act.[9] Accordingly, we will assume, without deciding, that the Louisiana statute does regulate the business of insurance, although the matter is not entirely free from doubt. One of the criteria for determining whether a law regulates the business of insurance is whether it has the effect of spreading or transferring a policyholder's risk.[10] The Supreme Court has emphasized that arbitration agreements are forum-selection provisions and do not displace substantive rights afforded by a statute or other substantive law.[11] An argument could be made that at least in theory, resolving claims in an arbitration rather than in a court before a jury does not substantially affect the risk pooling arrangement between the insurer and the insured. However, this court has held in *American Bankers Insurance Co. of Florida v. Inman*

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[9] 15 U.S.C. § 1012(b).

[10] *See Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982) (explaining that "three criteria relevant in determining whether a particular practice is part of the 'business of insurance' " include "whether the practice has the effect of transferring or spreading a policyholder's risk," although "[n]one of these three criteria is necessarily determinative in itself"); *cf. Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 338 (2003) (explaining, albeit in the context of ERISA, "that conditions on the right to engage in the business of insurance must also substantially affect the risk pooling arrangement between the insurer and the insured").

[11] *See, e. g., Preston v. Ferrer*, -- U.S. ---, 128 S.Ct. 978, 987, (2008) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral . . . forum." (omission in original) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985))).

that the Federal Arbitration Act[12] was reverse preempted by the McCarran-Ferguson Act in the context of a dispute between an injured insured and his insurer regarding underinsured-motorist coverage governed by Mississippi law.[13] Therefore, this issue is foreclosed in this circuit and in any event is not before us.

The Underwriters set forth three issues: whether (1) the Convention on the Recognition and Enforcement of Foreign Arbitral Awards is an "Act of Congress" within the meaning of the McCarran-Ferguson Act,[14] (2) the McCarran-Ferguson Act applies to international commercial transactions, and (3) the Convention takes precedence over the McCarran-Ferguson Act even if the latter applies to international transactions. For the reasons we consider below, we are persuaded that Congress did not intend to include treaties within the scope of an "Act of Congress" when it used those words in the McCarran-Ferguson Act, and we therefore do not reach other issues pressed by the Underwriters.

[12] 9 U.S.C. § 1 *et seq.*

[13] *See* 436 F.3d 490, 494 (5th Cir.2006) (holding that a state law prohibiting "required arbitration of disputes stemming from the uninsured motorist coverage provisions . . . regulates risk by subjecting all [such] policy disputes . . . to the possibility of a jury trial").

[14] 15 U.S.C. § 1012(b) ("No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . .").

III

LSAT contends that treaties stand on equal footing with acts of Congress, the Convention was not self-executing and could only have effect in the courts of this country when Congress passed enabling legislation, and therefore, the Convention's enabling legislation is the equivalent of an "Act of Congress" within the meaning of the McCarran-Ferguson Act. LSAT is correct that an act of Congress is on full parity with a treaty.[15] "'[W]hen a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.'"[16] The Underwriters maintain that the Convention was ratified after the McCarran-Ferguson Act was enacted and that in any event, the Convention is self-executing, which means that it did not require an act of Congress to have effect in United States courts. The Underwriters assert that a "later-in-time self-executing treaty supercedes a federal statute if there is a conflict."[17]

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[15] *Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion) ("[An] Act of Congress . . . is on a full parity with a treaty . . . ."); *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam) (same) (quoting *Reid*, 354 U.S. at 18); *see also Egle v. Egle*, 715 F.2d 999, 1013 (5th Cir.1983) ("Under our Constitution, treaties and statutes are equal in dignity. If a treaty and a statute are inconsistent, 'the one last in date will control the other ....'" (omission in original) (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888))).

[16] *Breard*, 523 U.S. at 376 (quoting *Reid*, 354 U.S. at 18); *see also Medellin v. Texas*, -- U.S. ---, n 6, 128 S.Ct. 1346, 1359 n.6 (2008) ("[A] later-in time federal statute supersedes inconsistent treaty provisions.").

[17] *Medellin*, 128 S.Ct. at 1364 (citing *Cook v. United States*, 288 U.S. 102, 119 (1933)).

The Convention is not an act of Congress, the Underwriters alternatively contend, even if the Convention was not self-executing, because a treaty is more than an act of Congress.

It is unclear whether the Convention is self-executing. The Supreme Court's recent decision in *Medellin v. Texas* instructs that "[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text."[18] In *Medellin*, the Court examined the Vienna Convention on Consular Relations[19] and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention[20] to determine whether a judgment of the International Court of Justice (ICJ) was "directly enforceable as domestic law in a state court in the United States."[21] The United States had agreed to submit disputes arising out of the Vienna Convention to the ICJ, but the Supreme Court recognized that "submitting to jurisdiction and agreeing to be bound are two different things."[22] The Court observed that the Optional Protocol "says nothing about the effect of an ICJ decision and does not itself commit signatories to comply with an ICJ judgment."[23] The Court went on to consider any obligations imposed by Article 94 of the United Nations Charter, finding that it also

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[18] *Id.* at 1357.

[19] Apr. 24, 1963, 1970 21 U.S.T. 77, 596 U.N.T.S. 261.

[20] Apr. 24, 1963, 1970 21 U.S.T. 325, 596 U.N.T.S. 487.

[21] *Medellin*, 128 S.Ct. at 1353.

[22] *Id.* at 1358.

[23] *Id.*

"does not provide that the United States 'shall' or 'must' comply with an ICJ decision, nor indicate that the Senate that ratified the U.N. Charter intended to vest ICJ decisions with immediate legal effect in domestic courts."[24] By contrast, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards expressly states that courts "shall" compel arbitration when requested by a party to an international arbitration agreement:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.[25]

The Convention additionally sets forth at least some procedures to be followed in obtaining enforcement of an arbitration award.[26] However, the Supreme Court indicated in dicta in *Medellin* that at least the provisions of the Convention pertaining to the enforcement of judgments of international arbitration tribunals are not self-executing.[27] This

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[24] *Id.*

[25] Art. II(3), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

[26] *See id.* arts. III, IV.

[27] *See Medellin*, 128 S.Ct. at 1366 ("Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes. The judgments of a number of international tribunals enjoy a different status because of

(continued...)

reference in *Medellin* could be read to imply that the Convention in its entirety is not self-executing, although such a conclusion cannot be drawn with any certainty from the brief discussion in the Court's opinion.

But even if the Convention required legislation to implement it in United States courts, that does not mean that Congress intended an "Act of Congress," as that phrase is used in the McCarran-Ferguson Act, to include a treaty. Implementing legislation does not replace or displace a treaty. A treaty remains something more than an act of Congress. It is an international agreement or contract negotiated by the Executive Branch and ratified by the Senate,[28] not Congress. The fact that a treaty stands on equal footing with legislation when implemented by Congress does not mean that it ceases to be a treaty and becomes an "Act of Congress."

The Supreme Court has indicated that the preemptive reach of the McCarran-Ferguson Act was

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(footnote continued)

implementing legislation enacted by Congress. [citing 9 U.S.C. §§ 201-08] . . . Such language demonstrates that Congress knows how to accord domestic effect to international obligations when it desires such a result." (citation omitted)); *see also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n. 15 (1974) (observing, although not in the context of whether the Convention was self-executing, "Congress passed Chapter 2 of the United States Arbitration Act in order to implement the Convention" (citation omitted)).

[28] *See* U.S. Const. art. II § 2 ("[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").

not intended to extend to the conduct of foreign affairs. The Supreme Court considered in *American Insurance Ass'n v. Garamendi* whether a state law, aimed at aiding Holocaust victims by requiring insurers to disclose information about insurance policies sold in Europe before and during World War II, interfered with the Federal Government's conduct of foreign relations.[29] The President of the United States had entered into an executive agreement with Germany's chancellor in which the United States agreed that whenever a German company was sued in an American court regarding a Holocaust-era claim, the United States government would submit a statement that "it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II."[30] This and other executive agreements regarding Holocaust claims had not been ratified as treaties by the United States Senate but were instead acts solely of the Executive Branch. The Supreme Court observed that "[g]enerally, . . . valid executive agreements are fit to preempt state law, just as treaties are, and if the agreements here had expressly preempted laws like [California's law], the issue would be straightforward."[31] The Court ultimately concluded that the state law conflicted with Presidential

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[29] *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401 (2003).

[30] *Id.* at 406.

[31] *Id.* at 416-17.

foreign policy as expressed in executive agreements with foreign nations and was preempted.[32] In addressing California's argument that in the McCarran-Ferguson Act "Congress authorized state laws of [the] sort [California had enacted]," the Court said,

> As the text itself makes clear, the point of McCarran-Ferguson's legislative choice of leaving insurance regulation generally to the States was to limit congressional preemption under the commerce power, whether dormant or exercised . . . . [A] federal statute directed to implied preemption by domestic commerce legislation cannot sensibly be construed to address preemption by executive conduct in foreign affairs.[33]

We think it unlikely that when Congress crafted the McCarran-Ferguson Act, it intended any future treaty implemented by an act of Congress to be abrogated to the extent that treaty conflicted in some way with a state law regulating the business of insurance if Congress's implementing legislation did not expressly save the treaty from reverse preemption by state law. If this had been Congress's intent, it seems probable that Congress would have included "or any treaty requiring congressional implementation" or similar language following "Act

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[32] *Id.* at 420-26.

[33] *Id.* at 427-28.

of Congress" and "such Act" when it said, "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance."[34] There is no indication in the McCarran-Ferguson Act that Congress intended, through the preemption provision and the use of the term "Act of Congress," to restrict the United States' ability to negotiate and implement a treaty that might affect some aspect of international insurance agreements in the same way that other international agreements would be affected by the terms of the treaty. If that were Congress's intent, it would seem, as we have said, that Congress would have more clearly articulated its design.

Most importantly, there is no apparent reason why Congress would have chosen to distinguish in the McCarran-Ferguson Act between treaties that are self-executing and those that are not. It is undisputed that if the provisions in the Convention directing courts to enforce international arbitration agreements were self-executing, then the McCarran-Ferguson Act would have no preemptive effect because self-executing treaties are not an "Act of Congress." No rationale has been offered by anyone as to why Congress would have intended to include a treaty that requires implementation by Congress within the reach of the McCarran-Ferguson Act's reverse preemption provisions but not self-executing treaties.

[34] 15 U.S.C. § 1012(b).

We are aware that the Second Circuit has held that "the Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation."[35] As a consequence, the Second Circuit held Congress's "implementing legislation [did] not preempt"[36] a Kentucky statute that "subordinated" all "choice of law or arbitration provisions" in a contract to which an insolvent insurer in liquidation proceedings was a party.[37] The court reasoned that "when the terms of [a treaty] import a contract-when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court."[38] The court then quoted the "[n]o Act of Congress" provision in the McCarran-Ferguson Act and said, "[a]ccordingly, the implementing legislation does not preempt the Kentucky Liquidation Act . . . ."[39]

We agree, of course, that when provisions of a treaty are not self-executing, they cannot be enforced in a court in this country unless and until those provisions are implemented by Congress. But, we submit, this does not answer the question of what Congress intended when it used the terms "[n]o Act of Congress" and "such Act" in 1945 or why Congress

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[35] *Stephens v. Am. Int'l Ins. Co.*, 66 F.3d 41, 45 (2d Cir.1995).

[36] *Id.*

[37] *Id.* at 43.

[38] *Id.* at 45.

[39] *Id.*

would have addressed only treaties that required implementation by Congress. The text of the McCarran-Ferguson Act does not support the inclusion by implication of "a treaty implemented by an Act of Congress." Because we give the phrases "Act of Congress" and "such Act" their usual, commonly understood meaning, we conclude that treaties, self-executing or not, are not reverse preempted by the McCarran-Ferguson Act.

The Supreme Court's decision in *Missouri v. Holland*[40] reflects that a treaty followed by implementing legislation, may accomplish more than either treaty or an Act of Congress, standing alone. The United States had consummated a treaty with Great Britain to protect migratory birds, and the treaty stated that "the two powers would take or propose to their lawmaking bodies the necessary measures for carrying the treaty out."[41] Accordingly, the treaty was not self-executing. An act was passed giving effect to the Convention, directing the Secretary of Agriculture to promulgate regulations and prohibiting the killing of migratory birds except as permitted by regulations compatible with the treaty.[42] The State of Missouri sought to prohibit the enforcement of the Migratory Bird Treaty Act and the Secretary's regulations, arguing that the statute

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[40] 252 U.S. 416 (1920).

[41] *Id.* at 431.

[42] *Id.* at 431-32.

interfered with rights reserved to the States by the Tenth Amendment.[43]

The Supreme Court recognized a difference between acts of Congress and "a treaty followed by such an act."[44] It observed that "[a]n earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad . . . ."[45] The Court said, "[w]hether the two cases cited [holding the prior Acts of Congress 'bad'] were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States."[46] The Court continued, "[w]e do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could ...."[47] The Supreme Court ultimately concluded "that the treaty and statute must be upheld."[48]

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[43] *Id.* at 430-31.

[44] *Id.* at 433.

[45] *Id.* at 432.

[46] *Id.* at 433.

[47] *Id.*

[48] *Id.* at 435.

In the present case, as in *Holland*, the treaty followed by the implementing legislation, must be considered as the sum of its parts, not piecemeal, in determining what Congress meant when it used the words "Act of Congress" and "such Act" in the McCarran-Ferguson Act.

Our focus on congressional intent and the conclusion that referral to arbitration is required in this case is reinforced by the Supreme Court's analysis in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[49] although the McCarran-Ferguson Act was not implicated in that case. The question was the "arbitrability, pursuant to the Federal Arbitration Act and the [Convention], of claims arising under the Sherman Act and encompassed within a valid arbitration clause in an agreement embodying an international commercial transaction."[50] The Court held such claims were arbitrable.[51] But in the process, the Supreme Court explained that "not . . . all controversies implicating statutory rights are suitable for arbitration."[52] In determining which are not, the Court said "[j]ust as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the *congressional intention expressed in some other statute* on which the courts

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[49] 473 U.S. 614 (1985).

[50] *Id.* at 616 (citations omitted).

[51] *Id.* at 626-27.

[52] *Id.* at 627.

must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable."[53] Importantly, the Court said, "[w]e must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history."[54]

Later in the *Mitsubishi* decision, the Supreme Court observed that "[t]he Convention reserves to each signatory country the right to refuse enforcement of an award where the 'recognition or enforcement of the award would be contrary to the public policy of that country.'"[55] The Court also noted that "Art. II(1) of the Convention, which requires the recognition of agreements to arbitrate that involve 'subject matter capable of settlement by arbitration,' contemplates exceptions to arbitrability grounded in domestic law."[56] "Yet in implementing the Convention by amendment to the Federal Arbitration Act, Congress did not specify any matters it intended to exclude from its scope."[57]

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[53] *Id.* (emphasis added).

[54] *Id.* at 628.

[55] *Id.* at 638 (quoting Convention on Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b), June 10, 1958, 21 U.S.T 2517, 330 U.N.T.S. 3).

[56] *Id.* at 639 n.21 ("And it appears that before acceding to the Convention the Senate was advised by a State Department memorandum that the Convention provided for such exceptions.").

[57] *Id.*

"Doubtless, Congress may specify categories of claims it wishes to reserve for decision by our own courts without contravening this Nation's obligations under the Convention."[58] But the Court "decline[d] to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions *where Congress has not expressly directed the courts to do so.*"[59]

The question, then, is whether the use of "no Act of Congress" and "such Act" in the McCarran-Ferguson Act is an express direction by Congress that a treaty such as the Convention is preempted to the extent it "invalidate[s], impair[s], or supersede[s]"[60] a state law that renders arbitration clauses unenforceable. For the reasons considered above, the text and context of the McCarran-Ferguson Act compel us to conclude that it contains no such express congressional direction.

The McCarran-Ferguson Act embodies a strong policy that the states have an interest in the regulation of the business of insurance. A reinsurance contract that has the potential to affect policyholders within a state unquestionably relates to the business of insurance. But concerns that a state's regulatory policies regarding such contracts may not be recognized in an international arbitration are ameliorated by provisions in the Convention and are not a basis for refusing to require that an

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[58] *Id.*

[59] *Id.* (emphasis added).

[60] 15 U.S.C. § 1012(b).

arbitration go forward. The Supreme Court explained in *Mitsubishi,* in the context of federal antitrust law, that "[h]aving permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed."[61] As already noted, the Court recognized, "[t]he Convention reserves to each signatory country the right to refuse enforcement of an award where the 'recognition or enforcement of the award would be contrary to the public policy of that country.'"[62] The Court observed "[w]hile the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them."[63] The same is true of any Louisiana laws that apply to the reinsurance agreements presently at issue.

The Supreme Court emphasized in *Mitsubishi* that "[a]s international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade."[64] The Court admonished:

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[61] *Mitsubishi,* 473 U.S. at 638.

[62] *Id.* (quoting Convention on Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3).

[63] *Id.*

[64] *Id.*

> If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration," and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.[65]

We note that as ratified by the United States, the Convention applies "only to differences arising out of legal relationships . . . which are considered as commercial under the national law of the State" ratifying or acceding to the Convention.[66] There is no doubt that the present dispute among three insurers arises out of legal relationships that are commercial. We are not called upon to explore the outer bounds of what "commercial" legal relationships may encompass.

In sum, the McCarran-Ferguson Act does not cause La. Rev. Stat. Ann. § 22:629 to reverse preempt the Convention with regard to the dispute before us.

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[65] *Id.* at 638-39 (quoting *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir.1942)).

[66] Art. I(3), 21 U.S.T., at 2561 n.3.

IV

We finally consider Safety National's request that we affirm the district court's ruling that the rights under the policies are assignable. The order embodying that ruling, dated August 13, 2003, has not been certified by the district court under 28 U.S.C. § 1292(b). We therefore lack appellate jurisdiction to consider it.[67]

* * *

We REVERSE the district court's denial of the motion to compel arbitration and remand for further proceedings consistent with this opinion.

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[67] *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996) ("The court of appeals may not reach beyond the certified order to address other orders made in the case.")

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

NOS. 02-1146-A & 05-262 A

SAFETY NATIONAL CASUALTY CORPORATION

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL

CONSOLIDATED WITH

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON

v.

SAFETY NATIONAL CASUALTY CORPORATION, ET AL

(February 14, 2006)

ORDER

On December 5, 2005, the court issued a ruling, concluding that the McCarran-Ferguson Act forbids the Convention from trumping La.R.S. 22:629(A)(2) since 9 U.S.C. §201, the Convention's enabling legislation, is not an Act of Congress that "specifically relates to the business of insurance" (doc. 81). Section 22:629(A)(2) nullifies arbitration agreements in insurance contracts. The court requested that the parties comment on the ruling's

effect, if any, on jurisdiction. Both Underwriters and LSAT responded (docs. 83, 84).

The court thereafter expressed its own doubt as to the correctness of the December 5, 2005 ruling and offered counsel an opportunity to comment (doc. 88).

The court has reviewed LSAT's response (doc. 89) and now declines to reconsider its ruling, especially in light of *American Bankers Ins. Co. of Florida v. Inman*, __ F.3d __ (5th Cir. 2006). The court also concludes, however, that the Convention remains a basis for federal question jurisdiction over this matter.

Underwriters has requested that the court certify the December 5,2005 ruling as appealable under 28 U.S.C. § 1292(b) (doc. 83). The court's own vacillation provides support for this request. Accordingly, IT IS HEREBY ORDERED that the court's ruling dated December 5, 2005 (doc. 81) is amended to include the following language:

"Although this matter is not arbitrable, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §201, et seq., is a basis for federal question jurisdiction over this matter.

The court is of the opinion that this ruling involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal may materially advance the ultimate termination of this litigation."

The matter is hereby referred to the Magistrate Judge for further proceedings.

Baton Rouge, Louisiana, February 13, 2006.

s/JOHN V. PARKER
JOHN V. PARKER
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

NOS. 02-1146-A & 05-262-A

SAFETY NATIONAL CASUALTY CORPORATION

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL

-CONSOLIDATED WITH-

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON

v.

SAFETY NATIONAL CASUALTY CORPORATION, ET AL

NOTICE TO COUNSEL

With apologies to all counsel, the court announces that it is having serious second thoughts regarding the correctness of the court's ruling dated December 5, 2005 (doc. 81). Because of such second thoughts, the court is considering reconsideration of that ruling.

Accordingly, even though all counsel have probably already said everything that there is to say on the subject of the Convention, all counsel are granted until the subject of reconsideration, as well as the merits of the ruling of December 5, 2005.

Baton Rouge, Louisiana, January 10, 2006.

s/JOHN V. PARKER
JOHN V. PARKER
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

NOS. 02-1146-A & 05-262-A

SAFETY NATIONAL CASUALTY CORPORATION

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL

-CONSOLIDATED WITH-

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON

v.

SAFETY NATIONAL CASUALTY CORPORATION, ET AL

RULING

This matter is before the court on a motion by defendant, Certain Underwriters at Lloyd's, London ("Underwriters"), to lift stay for the limited purpose of compelling arbitration among all necessary parties (doc. 32) and on a motion by plaintiff in intervention, Louisiana Safety Association of Timbermen ("LSAT"), to lift the stay, intervene, and quash arbitration (doc. 38). The court has already lifted the stay and granted LSAT leave to intervene (docs. 40, 48).

The motions were referred to United States Magistrate Judge Stephen Riedlinger (docs. 34, 48)

who recommended that Underwriters' motion be granted and LSAT's motion be denied.

In its objection (doc. 73) to the report and recommendation, LSAT questioned the very existence of an arbitration agreement, arguing that Underwriters offered only portions of the numerous policies and raising the issue of whether the forms containing the arbitration clauses even qualify as proper attachments to LSAT's policies. In addition to being long overdue, this argument is unfounded. As attachments to its jurisdictional brief (doc. 57), LSAT itself filed two separate Underwriters policies, each containing an arbitration clause.

The primary issue before the court is the viability of several insurance policy arbitration clauses. The court has previously determined that the allegations in Underwriters' complaint are sufficient to subject the policies to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention"). 9 U.S.C. § 201, *et seq.* (doc. 70) which was the predicate for federal removal jurisdiction. The Magistrate Judge concluded that the Convention preempts Louisiana's anti-arbitration law irrespective of the McCarran-Ferguson Act and, therefore, that the arbitration agreements are valid and enforceable.

LAW AND DISCUSSION

The McCarran-Ferguson Act, itself an Act of Congress, mandates that "No Act of Congress [the Convention's enabling legislation, 9 U.S.C. § 201, et seq.] shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance

[La.R.S. 22:629] . . . unless such Act [the Convention] specifically relates to the business of insurance [which it does not; it relates to the business of arbitration]." 15 U.S.C. § 1012(b).

Louisiana law prohibits arbitration clauses in insurance contracts. La.R.S. 22:629,[1] *Doucet v. Dental Health Plans Mgmt. Corp.*, 412 So.2d 1383, 1384 (La.1982). This prohibition, found in Part XIV of Louisiana's Insurance Code, is a regulation ofthe business of insurance[2] which would clearly be invalidated, impaired, or superseded if the arbitration clauses at issue were enforced pursuant to the Convention. Therefore, by the plain language of the McCarran-Ferguson Act, the Convention must yield to conflicting La.R.S. 22:629. The arbitration clauses are invalid and unenforceable.

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[1] "No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state or any group health and accident policy insuring a resident of this state, regardless of where made or delivered shall contain any condition, stipulation, or agreement . . . [d]epriving the courts of this state of the jurisdiction of action against the insurer . . . ." La.R.S. 22:629(A)(2). "Any such condition, stipulation, or agreement in violation of this Section shall be void, but such voiding shall not affect the validity of the other provisions of the contract." La.R.S. 22:629(8).

[2] *See United States Treasury Dept. v. Fabe*, 508 U.S. 491 (1993); *Standard Sec. Life Ins. Co. of New York v. West*, 267 F.3d 821 (8th Cir. 2001); *Mut. Reinsurance Bureau v. Great Plains Mut. Ins. Co., Inc.*, 969 F.2d 931 (10th Cir.), *cert. denied*, 506 U.S. 1061 (1992); *McKnight v. Chicago Title Ins. Co.*, 358 F.3d 854 (11th Cir. 2004).

The reasoning of the court in *Stephens v. American International Insurance Co.*, 66 F .3d 41 (2nd Cir. 1995) supports this conclusion. There a foreign insurer argued that under the Supremacy Clause, the Convention superseded a Kentucky statutory prohibition against compelling a liquidator to arbitrate. The court disagreed, citing the language of the McCarran-Ferguson Act and concluding that the Kentucky statute did regulate the business of insurance, that the Convention was an Act of Congress not specifically relating to the business of insurance and, therefore, that the Convention fell within the scope of the McCarran-Ferguson Act such the state law operated to prohibit arbitration.

While the issue is a close one, the court disagrees with the Magistrate Judge as to the persuasiveness of certain Eastern District opinions upon which he relied.[3] In the court's view, *Mitsubishi Motors Corp.*

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[3] In *McDermott v. International, Inc. v. Underwriters at Lloyd's, et al.* 1996 WL 291803 (E. D. La. 1996) the court held that the McCarran Ferguson Act did not apply in cases invoking rights under the Convention since the Convention of its own force preempts state law. On appeal, the Fifth Circuit never reached the propriety of this finding, even going so far as to comment that "we express no opinion on the correctness of the district court's conclusion that this case is governed by the Convention." *McDermott Int'l, Inc. v. Lloyds of London*, 120 F.3d 583, 586, n.6 (5th Cir. 1997). In *Continental Insurance Co. v. Jantran, Inc* , 906 F.Supp. 362 (E.D.La. 1995) an insured argued that the Convention was preempted by the McCarran-Ferguson Act and, therefore, that the arbitration clause in the policy was unapplicable. The court disagreed, relying upon two other Eastern District opinions (*McDermott Int'l, Inc. v. Underwriters at Lloyd's London, etc.*, 1992 WL 37695 (E.D.La.1992) and *In*

(continued...)

v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) is not on point. There the Supreme Court enforced an arbitration agreement covered by the Convention notwithstanding the jurisprudentially-developed rule that rights conferred by antitrust laws were inappropriate for enforcement by arbitration. The difference here is that the McCarran-Ferguson Act – forbidding Congressional interference into the business of insurance – is an Act of Congress and not ajurisprudentially-developed rule. When Congress enacted the Convention's enabling legislation in 1970, it was aware of the existence of the McCarran-Ferguson Act. If, in the interest of international comity, Congress intended for the Convention to trump application of the McCarran-Ferguson Act, it would have so specified. The court concludes that the Congress deferred to its longstanding view that the regulation of the business of insurance should be left to the states.

(footnote continued)

the Matter of an Arbitration Between The West of England, etc., 1992 WL 37700 (E.D.La.1992», both of which cite *Southland Corp. v. Keating*, 465 U.S. 1 (1984) and *Commerce Park at DFW Freeport v. Mardian Construction Co.*, 729 F.2d 334 (1984). Both *Southland* and *Commerce Park* hold that where a state statute conflicts with the Convention, it violates the Supremacy Clause. These two cases are distinguishable, however, since the arbitration clauses at issue were contained in contracts other than those of insurance (one was a construction contract, the other was a franchise agreement), therefore, the application of the McCarran-Ferguson Act (a federal law dealing specifically with the states' regulation of the insurance business) was not at issue.

As noted *supra*, the Louisiana statute La.R.S. 22:629 does regulate the business of insurance. The Magistrate Judge specifically noted that "[n]either Underwriters nor Safety National raised the issue of proper delivery under LSA-R.S. 22:629 in their opposing memoranda" (doc. 72, p. 12, n. 26). Attached to Underwriters' motion is a copy of one of the policies issued to LSAT. The policy intermediary is listed as Braxton Reinsurance Brokers, Inc. located in Metairie, Louisiana (doc. 33, exhibit A, p. 2(b)). Assuming all policies are identical in this respect, the court concludes that they were "delivered or issued for delivery" in Louisiana such that La.R.S. 22:629 applies to each of them.

In sum, the McCarran-Ferguson Act forbids the Convention from invalidating La.R.S. 22:629(A)(2) which nullifies arbitration agreements in insurance contracts because 9 U.S.C. § 201, the Convention's enabling legislation, is not an act of the Congress that "specifically relates to the business of insurance." The court's ruling raises another issue: federal jurisdiction. Within 15 days of this date, the parties shall comment on what effect, if any, the court's conclusion has on the court's ability to retain jurisdiction pursuant to 9 U.S.C. § 203.[4]

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[4] See, for example, *Transit Casualty Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 623-624 (8th Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998), where the Eighth Circuit commented in dicta that "[t]he district court determined that the McCarran-Ferguson Act's inverse-preemption prevented the parties' reinsurance agreements from governance by the Convention. Because the parties' reinsurance agreements must fall under the Convention in order the (continued...)

CONCLUSION

For the foregoing reasons, the report and recommendation of the magistrate judge is disapproved. Underwriters' motion to compel arbitration (doc. 32) is hereby DENIED and LSAT's motion to quash arbitration (doc. 38) is hereby GRANTED.

Baton Rouge, Louisiana, December 5, 2005.

s/JOHN V. PARKER

JOHN V. PARKER
UNITED STATES DISTRICT JUDGE
MIDDLE DISTRICT OF LOUISIANA

(footnote continued)

underwriters to remove under 9 U.S.C. § 205, the district court's finding that the Convention does not apply in this cause of action resulted in the lack of removal jurisdiction and necessitate remand."

APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

NO. 02-1146-A-1

SAFETY NATIONAL CASUALTY CORPORATION

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL

MAGISTRATE JUDGE'S REPORT

This matter is before the court on the Motion to Lift Stay for the Limited Purpose of Compelling Arbitration Among All Necessary Parties, filed by defendant Certain Underwriters at Lloyd's, London (Underwriters). Record document number 32. Also before the court is the Motion to Lift Stay, Intervene and Quash Arbitration, filed by plaintiff in intervention Louisiana Safety Association of Timbermen - Self Insurers Fund (LSAT).[1] Record document number 38. Underwriters' motion was opposed by plaintiff Safety National Casualty

[1] The district judge lifted the stay and granted LSAT leave to intervene. Record document number 40. LSAT's motion to quash arbitration was referred to the magistrate judge for report and recommendation. Record document number 48.

Corporation.[2] LSAT's motion was opposed by Underwriters and Safety National.[3]

Safety National filed this action seeking reimbursement on numerous unidentified workers' compensation claims from excess insurance policies issued by Underwriters. Safety National alleged that Underwriters originally issued these insurance policies to LSAT for the purpose of indemnifying it for payments made as a result of workers' compensation losses. These insurance policies contained an arbitration clause which is at issue in this matter.[4] LSAT subsequently assigned certain workers' compensation liabilities and benefits to Safety National in a Self-Insurance Loss Portfolio Transfer Assumption Agreement (Transfer Agreement), including rights under the policies issued by Underwriters.

Underwriters filed a motion to dismiss Safety National's claims asserting that because LSAT did not obtain Underwriters' consent to the assignment, Safety National had no rights under the reinsurance agreement, and therefore, lacked standing to bring

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[2] Record document number 43. Underwriters filed a reply to Safety National's opposing memorandum. Record document number 45.

[3] Record document numbers 45 and 47, respectively. LSAT filed a reply memorandum. Record document number 51. Safety National also filed a supplemental opposing memorandum. Record document number 54.

[4] Record document number 33, Underwriters' supporting memorandum, exhibit A, Specific Employer Excess Occupational Accident Insurance Policy (Underwriters' Insurance Policy), Article XVI.

its lawsuit.[5] Alternatively, Underwriters sought a stay pending arbitration. The district judge ruled that Safety National did have standing to bring the suit because Underwriters' consent was not necessary to issue the Transfer Agreement to Safety National.[6] Safety National agreed that arbitration was appropriate for interpreting the agreement and determining their respective rights and obligations with Underwriters.[7] Underwriters' alternative motion to stay pending arbitration was granted.[8]

Underwriters initiated arbitration on October 27, 2003 against Safety National and LSAT.[9] LSAT subsequently filed a complaint of intervention in CV 02-1146 for the limited purpose of quashing the arbitration.[10] LSAT asserted that the arbitration clause contained in the policies was void and without effect and that the arbitration should be quashed.

Underwriters also filed a separate suit against Safety National and LSAT seeking recovery of outstanding insurance premiums due under the contracts.[11] This case was consolidated with CV 02-1146 on April 29, 2005.[12]

[5] Record document number 16.

[6] Record document number 28.

[7] Record document number 27.

[8] Record document number 28.

[9] Record document number 33, Underwriters' supporting memorandum, exhibit B, October 27, 2003 letter.

[10] Record document number 41.

[11] CV 05-0262, Record document number 1. Pursuant to the jurisdictional allegations asserted in the complaint, subject

(continued...)

In its motion to compel arbitration, Underwriters argued that the claims asserted by LSAT and Safety National arise out of the contracts and fall under the scope of a broad arbitration clause contained within those contracts.[13] In its reply, Safety National asserted that the Underwriters' claims involving premium collection do not involve Safety National and are unrelated to its suit. Safety National argued that if LSAT's claims are subject to arbitration, those claims should be separately arbitrated or, in the alternative, each party should appoint one arbitrator with the three deciding all issues among the parties and issuing separate opinions as to each dispute. In response, Underwriters asserted that under the terms of the agreement, it is required to resolve conflicts in a single forum against a single opposing arbitrator. In its motion to quash arbitration,[14] LSAT argued that the arbitration clause contained in

(footnote continued)

matter jurisdiction over CV 05-0262 was established under 28 U.S.C. § 1331 and 9 U.S.C. § 203. *See*, CV 02-1146, record document number 70. Safety National amended its complaint in CV 02-1146 to conform with the subject matter jurisdiction allegations asserted in CV 05-0262. Subject matter jurisdiction over CV 02-1146 is maintained under the same reasoning.

[12] Record document number 59.

[13] Neither Safety National nor LSAT disputed that the claims involved in CV 02-1146 and CV 05-0262 fall under the scope of the arbitration clause.

[14] LSAT's memorandum supporting its motion to quash was also considered as its opposition to Underwriters' Motion to Compel Arbitration.

the policies is void under Louisiana law.[15] Safety National replied to LSAT's motion with the same assertions made in its opposition to the Underwriters' Motion to Compel. Underwriters' opposing memorandum refuted LSAT's assertions that Louisiana law invalidated the arbitration clause contained in the insurance agreement.

Applicable Law

The Supreme Court has determined that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960). The question of arbitrability, i.e. whether the dispute is subject to a valid agreement to arbitrate, is an issue to be determined by the courts. *Local Union No. 898 of the International Brotherhood of Electrical Workers, AFL-CIO v. NL Electric, Inc.*, 380 F.3d 868, 870 (5th Cir. 2004), citing, *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 208-09 (1991). The court's examination of arbitrability is very limited. Resolving the issue of arbitrability does not encompass making determinations on the merits of claims, including "procedural questions which grow out of the dispute and bear on its final disposition." *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964); General *Warehousemen and Helpers Union Local 767*

[15] In support of its motion, LSAT argued that it is not an insurer, that membership in the fund is not insurance and that the policies at issue are not "reinsurance". This assertion was not disputed by Underwriters or Safety National.

v. Albertson's Distribution, Inc., 331 F.3d 485, 488, 490 (5th Cir. 2003).

Safety National filed suit in the district court alleging diversity jurisdiction under 28 U.S.C. § 1332.[16] It later amended its complaint to assert federal question jurisdiction on the basis that the arbitration agreement is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Award, 9 U.S.C. § 201 et seq. (Convention).[17]

In determining whether the Convention requires compelling arbitration, the Court's inquiry is limited to determining whether an arbitration agreement exists which falls within the Convention's coverage. In order to fall within the coverage of the Convention, the court must find that: (1) there is a written agreement to arbitrate the matter; (2) the agreement provides for arbitration in a Convention signatory nation; (3) the agreement arises out of a commercial legal relationship; and (4) a party to the agreement is not an American citizen. *Freudensprung v. Offshore Technical Services, Inc.*, 379 F.3d 327, 339 (5th Cir. 2004), *citing, Sedco, Inc.*, 379 F.2d 1140, 1144-45 (5th Cir. 1985). Once these factors are established, arbitration is mandated "unless [the court] finds that the said agreement is null and void, inoperative or incapable of being performed." *Id., citing, Sedco, Inc.*, 379 F.2d at 1146 (quoting Convention, Article II(3)).

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[16] Record document number 1, ¶ 1.

[17] Record document number 68, ¶ 1.

Under the Supremacy Clause of the United States Constitution, state law in conflict with federal law is preempted and has no effect. U.S. Const. art. VI, cl. 2. *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114 (1981). The McCarran-Ferguson Act, 15 U.S.C. § 1012, was enacted to prevent federal preemption of state statutes regulating the business of insurance and effectuates preemption of federal law (reverse preemption) when the following conditions are met: 1) the federal law does not specifically relate to the business of insurance; 2) the federal law would invalidate, impair or supersede the state statute if applied; and 3) that state statute was enacted for the purpose of regulating insurance. *Humana, Inc. v. Forsyth*, 525 U.S. 299, 306, 119 S.Ct. 710 (1999); Edwards v. Your Credit, Inc., 148 F.3d 427 (5th Cir. 1998). The statute specifically provides:

> (a) State regulation
>
> The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) Federal regulation
>
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the

> Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C.A. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State law. 15 U.S.C. § 1012

LSA-R.S. 22:629 imposes restrictions on insurance contracts and provides in pertinent part:

> A. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident or to be performed in this state, shall contain any condition, stipulation or agreement:
>
> (2) Depriving the courts of this state of the jurisdiction of action against the insurer . . .

The court must determine whether LSA-R.S. 22:629 reverse preempts the Convention pursuant to the McCarran-Ferguson Act in this case.

Analysis

The court has already determined that the arbitration agreement falls under the Convention.[18]

[18] Record document number 70

The issue that must be addressed is whether the arbitration clause in the insurance policies is null and void, inoperative, or incapable of being performed. In its motion to quash, LSAT argued that the arbitration clause contained in the insurance policies are void under LSA-R.S. 22:629. Underwriters argued that this court previously enforced the arbitration clause[19] and that LSA-R.S. 22:629 is inapplicable since arbitration proceedings do not "deprive the courts of this state of the jurisdiction of action against the insurer". In support of this argument, Underwriters cited an unpublished Western District of Louisiana case and other Louisiana cases which either enforced arbitration provisions in insurance contracts or upheld arbitration awards without comment on LSA-R.S. 22:629.[20]

The Fifth Circuit Court of Appeals has recognized that compulsory arbitration clauses in insurance contracts are unenforceable under LSA-R.S. 22:629 in some circumstances.[21] Therefore, Underwriters' position is unpersuasive since the cases cited do not address their apparent conflict with the controlling Fifth Circuit precedents.

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[19] Record document number 28

[20] Record document number 45, opposing memorandum, pp. 12-13

[21] *McDermott International, Inc. V. Lloyds Underwriters of London* (McDermott II), 120 F.3d 583, 586 (5th Cir. 1997), citing, *West of England Ship Owners Mut. Ins. Ass'n (Luxembourg) v. American Marine Corp.*, 981 F.2d 749, 750 (5th Cir. 1993) and *Doucet v. Dental Health Plans Management Corp.*, 412 So.2d 1383, 1384 (La. 1982).

Nevertheless, LSAT's argument in favor of the reverse preemption of the Convention by LSA-R.S. 22:629 is also unpersuasive. In support of its argument, LSAT cited *Standard Sec. Life Ins. Co. of New York v. West*, 267 F.3d 821 (8th Cir. 2001) which held that the McCarran-Feurguson Act's reverse preemption operated to bar the application of the Federal Arbitration Act (FAA), 9 U.S.C. § 2, under the Missouri Arbitration Act which rendered an insurance policy's arbitration clause unenforceable.[22] That case is distinguishable from the instant case because Standard involved domestic parties and focused on the reverse preemption of Chapter 1 of the FAA by Missouri law under the McCarran-Ferguson Act. The Standard court did not address the issue of state regulation of international conduct.

LSAT cited additional cases which held that state law prohibiting the enforcement of arbitration clauses in insurance contracts was not preempted by the FAA.[23] Again, none of these cases are controlling nor do they address the issue of whether state law invalidates an arbitration agreement between domestic and international parties falling under the Convention.

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[22] *Standard*, 267 F.3d at 823. The FAA consists of three chapters: (1) General Provisions; (2) Convention on the Recognition and Enforcement of Foreign Arbitral Awards; and (3) Inter-American Convention on International Commercial Arbitration. All of the cases cited by LSAT, including Standard, involved arbitration agreements solely governed by the "General Provisions" of the FAA.

[23] Record document number 39, supporting memorandum, pp. 17-18.

Underwriters' opposition to reverse preemption is equally unhelpful to this analysis. Underwriters argued that Louisiana law does not invalidate arbitration clauses contained within insurance policies and is consistent with the well-settled policy that arbitration provisions under the FAA must be liberally enforced. As discussed above, the Fifth Circuit has consistently recognized arbitration clauses in insurance policies are unenforceable under LSA-R.S. art. 22:629. Moreover, this court recognizes the jurisprudence cited by LSAT which affirms the reverse preemption of Chapter 1 of the FAA, where state law invalidates arbitration clauses in insurance policies between domestic parties.

While the Fifth Circuit has not rendered an opinion addressing this issue, the Eastern District of Louisiana has repeatedly held that the McCarran-Ferguson Act does not apply in cases invoking rights under the Convention.[24] In *McDermott I*, an insured argued that the arbitration clause of an insurance policy was null and void under LSA-R.S.

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[24] *McDermott International, Inc. v. Underwriters at Lloyd's, et al.* (McDermott I), 1996 WL 291803 (E.D. La. May 30, 1996); *Continental Insurance Company v. Jantran, Inc.*, 906 F.Supp. 362 (E.D. La. Nov. 15, 1995); and *In the Matter of an Arbitration Between the West of England Ship owners Mutual Insurance Association (Luxembourg) and American Marine Corporation*, 1992 WL 37700 (E.D. La. Feb. 18, 1992). *See also, Antillean Marine Shipping Corp. v. Through Transport Mutual Insurance, Ltd.*, 2002 WL 32075793 (S.D. Fl. Jul. 24, 2002) and *Assuranceforeningen Skuld v. Apollo Ship Chandler, Inc.*, 847 So.2d 991 (Fla. App. 3 Cir. 2003) (upholding the Eastern District's findings).

22:629(A)(2) and the McCarran-Ferguson Act.[25] The court found that the insurer offered no new authoritative law that supported its argument.[26] The court also reviewed the analysis in a Second Circuit case, *Stephens v. American Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995), which held that the Convention was reverse preempted under the McCarran-Ferguson Act and distinguished it as follows:

> The Second Circuit reversed the district court and held that the McCarran-Ferguson Act preserved the antiarbitration provision from preemption by the Federal Arbitration Act and the Liquidator could not be

[25] *McDermott I*, 1996 WL 291803 at 3. The court originally rejected this argument in the insurer's Motion to Compel Arbitration. *See*, footnote 11.

> When the court granted the insurer's Motion to Compel Arbitration, the court found that "The McCarran-Ferguson Act does not apply to contracts made under the Convention, as it was intended to apply only to interstate commerce, not foreign commerce." After this court initially rejected McDermott's McCarran Ferguson argument, the Louisiana Department of Insurance judicially stipulated that LSA-R.S. 22:629 does not apply to the subject policy. (citations omitted).

[26] *McDermott I* was affirmed for different reasons by the Fifth Circuit in *McDermott II*, 120 F.3d at 586-87. The court found that LSA-R.S. 22:629 was not triggered because the Lloyd's insurance policy was not "delivered or issued for delivery" in Louisiana. Neither Underwriters nor Safety National raised the issue of proper delivery under LSA-R.S. 22:629 in their opposing memoranda.

compelled to arbitration. In so holding, the court addressed the *foreign* reinsurers' argument (which had not been addressed by the district court) that even if the Kentucky Liquidation Act was not preempted by the Federal Arbitration Act as to the *domestic* reinsurer, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (as implemented by the FAA, 9 U.S.C. § 201, et seq.) would still require arbitration of their claims because the Convention supersedes the Kentucky Liquidation Act. The court rejected this argument, reasoning that "the Convention is not self-executing, and therefore, relies on an Act of Congress for Implementation. *See* 9 U.S.C. §§ 201-208 (1994)." *Id.* at 45.

This court finds Stephens distinguishable from the present case because the *Stephens* court was not concerned with the state regulation of extra-territorial conduct, but rather with the application of state law to a domestic insurance company in liquidation. Further, while the *Stephens* court failed to give the Convention treaty preemptive force because it was implemented by the Convention Act, this court disagrees with such an analysis and finds that

> the Convention of its own force preempts state law.
>
> Finally, *Stephens* failed to discuss or apply the Supreme Court's decision to "decline to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions [to arbitrability] where Congress has not expressly directed the courts to do so." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n. 21 (1985). No such express exception exists for the McCarran-Ferguson Act.

McDermott I, WL 291803 at 3-4.

No subsequent authority supporting a different reasoning from that of the Eastern District has been issued in this jurisdiction.

Furthermore, the reasoning of the Eastern District decisions is supported by the reasoning set forth in *Sedco*. The Fifth Circuit was required in that case to address the conflict between the right to appeal the denial of a stay pending arbitration, *i.e.* refusal to enforce an arbitration agreement falling under the Convention, and the doctrine of *Schoenamsgruber v. Hamburg American Line*, 294 U.S. 454, 55 S.Ct. 475 (1935), which prohibits appeals from a district court's order to stay admiralty proceedings pending arbitration. The Fifth Circuit in Sedco held that the *Schoenamsgruber* doctrine must give way to the extent that this jurisprudential rule interfered with

the obligations under the Convention. In its analysis, the court recognized the Convention's authority:

> This Convention is the supreme law of the land. By its ratification in 1970, the United States obligated itself to enforce arbitration agreements between foreign and domestic contracting parties. Any law or decision prior in time to this express undertaking must be construed as consistent with the Convention or set aside by it.[27]

The court further noted that the Convention was passed to secure the right of arbitration in a commercial context among foreign and domestic parties.[28] "Congress could not have intended that a court's refusal to enforce an arbitration agreement falling under the Convention would be immediately appealable in a nonmaritime action – at law or equity – but would be shielded from appellate scrutiny in a admiralty suit."[29]

The holding in Sedco was also premised on the rationale provided by the Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 105 S.Ct. 3346 (1985), which enforced an agreement to arbitrate covered by the Convention over objections that doing so contravened

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[27] *Sedco*, 767 F.2d at 1148. The McCarran-Ferguson Act was enacted in 1945.

[28] *Sedco*, 767 F.2d at 1149.

[29] *Id.*

domestic law and public policy. The Court was required to decide whether the Convention would override *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968), which held that rights conferred by antitrust laws were inappropriate for arbitration. The Court held that this consideration is overcome by other factors relevant to international transactions:

> . . . we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.[30]

Under this same reasoning, the Convention preempts LSA-R.S. 22:629 irrespective of the McCarran-Ferguson Act. This determination also maintains the consistency of law amongst the courts within the Fifth Circuit. Safety National, LSAT, and Underwriters should be compelled to arbitrate their disputes.

LSAT additionally asserted that the premium obligations were not transferred to Safety National, and therefore it should not be required to participate in the arbitration between Safety National and Underwriters. The court does not have the authority

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[30] *Mitsubishi Motors Corp.*, 473 U.S. at 629, 105 S.Ct. at 3354

to determine whether LSAT is a necessary party to this dispute or whether its dispute with Underwriters is unrelated to Safety National's claims. This determination requires an analysis of the Transfer Agreement and the role the premium payments have on issues presented before the arbitrator. As stated above, this court is limited to deciding issues of arbitrability. Questions concerning the merits of the underlying claims and related procedural issues are reserved for the arbitrator.[31]

With respect to the parties' contentions regarding the number of arbitrators to be appointed, the court may enforce the method of arbitrator appointment as provided in the contract.[32] This court finds that the

[31] *See, Ikuei v. United States Shoe Corporation*, 755 F.Supp. 299 (D. Hawaii Jan. 8, 1991) (plaintiff's claim that it was not a proper party to arbitration constituted a procedural defense to the defendant's request for arbitration and was therefore a matter for the arbitrator).

[32] 9 U.S.C. § 5 provides:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically

(continued...)

method provided in the insurance policy is proper.[33] Underwriters did not consent to alter the two arbitrator method and should not be divested of these rights because LSAT transferred some of its rights and/or obligations as an "Insured" to Safety National. LSAT and Safety National are required to appoint one arbitrator to represent their interests in this matter. Any disputes regarding arbitrator appointment between Safety National and LSAT, including Safety National's argument that it is an adverse party with LSAT, should be resolved in accordance with the Transfer Agreement.

Recommendation

It is the recommendation of the magistrate judge that the Motion to Lift Stay for the Limited Purpose of Compelling Arbitration Among All Necessary Parties, filed by defendant Certain Underwriters at Lloyd's, London (record document numbers 32) be granted.

(footnote continued)

> named therein, and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

[33] Record document number 33, exhibit A, Underwriters' insurance policy, Article XVI. With respect to the appointment of arbitrators, the arbitration clause provides:

> One arbitrator shall be chosen by the Underwriters, one by the Insured and an umpire by the two arbitrators before they enter upon arbitration.

It is further recommended that the Motion to Lift Stay, Intervene[34] and Quash Arbitration, filed by plaintiff in intervention Louisiana Safety Association of Timbermen - Self Insurers Fund (record document number 38) be denied.

Baton Rouge, Louisiana, August 22, 2005

s/STEPHEN C. RIEDLINGER
STEPHEN C. RIEDLINGER
UNITED STATES MAGISTRATE JUDGE

[34] LSAT's motion to intervene was previously granted by the district judge. Record document number 40.

APPENDIX G

PROVISIONS OF McCARRAN-FERGUSON ACT

(15 U.S.C. §§ 1011-1015)

§ 1011. Declaration of Policy

Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance .

APPENDIX H

PROVISIONS OF CHAPTER 2 OF THE FEDERAL ARBITRATION ACT

(9 U.S.C. §§ 201–208)

§ 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

§ 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

§ 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

§ 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

§ 208. Residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

APPENDIX I

PROVISIONS OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

(June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38)

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the

same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

APPENDIX J

PROVISIONS OF THE LOUISIANA REVISED STATUTES

(Title 22: Insurance Code)

§ 22:868. Limiting actions; jurisdiction[1]

A. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state . . . shall contain any condition, stipulation, or agreement

> (2) Depriving the courts of this state of the jurisdiction of action against the insurer.

C. Any such condition, stipulation, or agreement in violation of this Section shall be void, but such voiding shall not affect the validity of the other provisions of the contract.

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[1] Louisiana Revised Statute § 22:868 was formerly designated § 22:629, and was renumbered in Acts 2008, No. 415, § 1 (effective January 1, 2009).

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IN THE

Supreme Court of the United States

LOUISIANA SAFETY ASSOCIATION OF TIMBERMEN – SELF INSURERS FUND,

Petitioner,

—v—

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, IN OPPOSITION TO THE PETITION

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QUESTION PRESENTED

Whether the Fifth Circuit correctly held that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a treaty ratified by the President with the advice and consent of the Senate under Article II of the Constitution, is a treaty rather than an Act of Congress for purposes of the McCarran-Ferguson Act.

PARTIES

Petitioner is Louisiana Safety Association of Timbermen – Self Insurers Fund.

Respondents submitting this Brief in Opposition are Certain Underwriters at Lloyd's, London, subscribing to Certificate Nos. TNC0145/91/110, TNC0146/91/105, TNC0302/91/104, TNC0369/91, TNC0145/92/114, TNC0146/92/106, TNC0147/92/103, TNC0302/92/107, TNC0370/92/105, TNC0145/93/114, TNC0146/93/104, TNC0147/93/102, TNC0302/93/104, TNC0370/93/102, TNC0145/94/108, TNC0146/94/104, TNC0147/94/101, TNC0302/94/106, TNC0370/94/103, TNC0145A/95/105, TNC0145B/95/104 and TNC0693/96 ("Underwriters"). Underwriters are not a corporation.

Safety National Casualty Corporation was an additional party below, and petitioner named it as an additional respondent in the petition, but it did not participate in the rehearing *en banc* and took no position on the issue presented by the petition.

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STATEMENT OF THE CASE

A. The Reinsurance Agreements.

Beginning in 1991, Louisiana Safety Association of Timbermen–Self Insurers Fund ("LSAT") approached respondents Certain Underwriters at Lloyd's, London ("Underwriters"), to obtain reinsurance for LSAT's self-insured workers' compensation trust. App. 3a, 122a; 3d Suppl. & Am. Compl. ¶¶ 3, 8 (No. 02-cv-1146) (filed Sept. 20, 2005).[1] LSAT thereby chose to seek reinsurance in the London market—not only outside Louisiana but outside the United States. LSAT was represented in the negotiations by Braxton Reinsurance Brokers, Inc., a U.S. reinsurance broker, and Stirling Cooke, a U.K. reinsurance broker. Underwriters were represented by their Lloyd's syndicate managers, based in London. LSAT, initially through Braxton and Stirling, made a presentation of the risk to Underwriters. As a result, following negotiations, Underwriters and LSAT agreed to enter into various contracts, providing coverage (subject to the terms and conditions thereof) if losses exceeded LSAT's retention. Each contract contained an arbitration clause, requiring that all disputes arising under the contract be resolved by binding arbitration.

LSAT subsequently entered into an agreement titled "Loss Portfolio Transfer Agreement" with

[1] The Louisiana Supreme Court has held that coverage of the type at issue here, whereby the LSAT fund ceded part of its risk to another insurer, "presents a classic instance of reinsurance, not excess insurance." *La. Safety Ass'n of Timbermen—Self Insurers Fund v. La. Ins. Guar. Ass'n*, 17 So. 3d 350, 359 (La. 2009).

Safety National Casualty Corporation ("Safety National"), by which LSAT transferred certain risks to Safety National. Because of that agreement, Safety National laid claim to any reinsurance proceeds from Underwriters. Underwriters have disputed and continue to dispute the validity of the purported loss portfolio transfer.

B. Proceedings in the District Court.

Disputes arose between the parties as to the interpretation and application of certain provisions of the reinsurance contracts, including the commutation clauses and sunset clauses. As a result, three suits were filed, all of which have been consolidated in the United States District Court for the Middle District of Louisiana.

Underwriters sought to compel arbitration under the reinsurance agreements, but LSAT challenged the enforceability of the agreements to arbitrate. The district court held that the arbitration clauses were unenforceable because of a Louisiana statute, La. Rev. Stat. § 22:868 (formerly § 22:629), which LSAT contends bars the enforcement of arbitration clauses in insurance contracts. The district court recognized that such a state law would ordinarily be preempted as inconsistent with Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (the "New York Convention" or "Convention"), which requires the enforcement of arbitration clauses in international contracts. The district court held, however, that Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), shielded the Louisiana state law from preemption, and allowed it to reverse-preempt the New York

Convention. App. 119a. In relevant part, Section 2(b) of the McCarran-Ferguson Act states that

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act [of Congress] specifically relates to the business of insurance. . . .

15 U.S.C. § 1012(b).

Recognizing that there was substantial ground to differ with his arbitration decision, the district judge certified the issue for interlocutory appeal under 28 U.S.C. § 1292(b). App. 109a. The Fifth Circuit granted permission to appeal. App. 5a, 89a.

C. Proceedings in the Court of Appeals.

After briefing and argument, a panel of the Fifth Circuit reversed the district court, reasoning that the New York Convention is a treaty, not an Act of Congress, and therefore not subject to reverse preemption by the plain terms of the McCarran-Ferguson Act. App. 85a. LSAT then petitioned for rehearing *en banc*, which was granted. App. 5a n.7.

After further briefing and reargument, the *en banc* court, by a vote of 15 to 3, reached the same result as the panel. The majority opinion, written by Judge Owen for 14 members of the court, observed that the McCarran-Ferguson Act applies only to Acts of Congress, not to treaties such as the New York Convention.

LSAT had argued that the New York Convention was entirely non-self-executing, that as a

result, the requirement to enforce the arbitration agreement arose from the implementing legislation, *see* 9 U.S.C. §§ 201-208, rather than the treaty itself, and that, as such, the controlling law was an "Act of Congress." The *en banc* court, however, held that it was irrelevant whether the Convention or any part of the Convention was self-executing. The court recognized that, regardless of whether the relevant provision of the Convention was self-executing, the implementing legislation did not prescribe the substantive standards for enforcing agreements to arbitrate, but instead directed courts to enforce the Convention itself. Specifically, the court noted that the implementing legislation states that "the Convention 'shall be enforced in United States courts in accordance with this chapter.'" App. 19a (quoting 9 U.S.C. § 201). The court further pointed out that the implementing legislation referred to international arbitration agreements as "fall[ing] ... under *the Convention*," rather than as falling under the implementing legislation, App. 20a (quoting 9 U.S.C. § 202) (court's emphasis), and that actions to enforce arbitration in international contracts should be "deemed to arise under the laws *and treaties* of the United States," App. 20a (quoting 9 U.S.C. § 203) (court's emphasis). Thus, the court reasoned that Congress's intent, as reflected in the implementing legislation, was that the New York Convention was to be enforced *as a treaty*, not as an Act of Congress. App. 20a-22a.

On that basis, the majority, consisting of 14 of the 18 judges sitting *en banc*, held that the McCarran-Ferguson Act did not apply as a matter of statutory interpretation, and that it was unnec-

essary to reach the question of whether any provision of the Convention was self-executing. The court noted that it had reached a different result from the Second Circuit in *Stephens v. American International Insurance Co.*, 66 F.3d 41 (2d Cir. 1995) ("*Stephens*"), but pointed out that the Second Circuit itself had called *Stephens* into question in *Stephens v. National Distillers & Chemical Corp.*, 69 F.3d 1226 (2d Cir. 1995) ("*National Distillers*"). App. 34a-36a.

Judge Clement wrote a separate opinion, for herself only, concurring in the judgment. Judge Clement concluded that, under this Court's analysis in *Medellín v. Texas*, 552 U.S. 491 (2008), Article II(3) of the New York Convention is plainly self-executing, because the Convention by its terms addresses judicial authorities rather than the political branches of government. App. 38a. Thus, she concluded, the requirement to enforce the arbitration agreement must arise from the Convention itself. The Second Circuit's contrary decision in *Stephens*, Judge Clement observed, "undertook no textual analysis and set forth no reasons to support its conclusion," and "was decided before *Medellín*, which provides critical guidance to lower courts for determining when treaty provisions are self-executing." App. 48a. Disagreeing with the dissent, Judge Clement also concluded that the issue of whether the Convention was self-executing had been properly preserved for review. App. 39a n.2.

Judge Elrod wrote a dissenting opinion, joined by two other members of the court. The dissenters took the view that, unless the Convention is self-executing, the legal requirements to enforce an

arbitration clause can arise only under the implementing legislation, and therefore are subject to the McCarran-Ferguson Act. App. 50a. Judge Elrod, however, found it unnecessary to actually decide whether the Convention was self-executing, because she concluded that Underwriters had waived the point. App. 81a n.31.

In accordance with the *en banc* majority opinion, the district court's order was vacated and the case remanded for further proceedings. LSAT filed a petition for certiorari, which Underwriters now oppose.

REASONS FOR DENYING THE WRIT

I. No Genuine Conflict Among the Circuits Exists.

A. The Second Circuit's Decision in *Stephens v. American International* Did Not Address the Grounds on Which the Fifth Circuit Majority Relied Below.

For its claim of a circuit split, LSAT relies on the Second Circuit's 15-year-old decision in *Stephens*. That decision, however, does not present a true conflict with the decision below.

In *Stephens*, the Second Circuit held, with little explanation, that the New York Convention was non-self-executing, and that as a result, the McCarran-Ferguson Act protected from preemption a state law barring certain insurance arbitrations. 66 F.3d at 45. But the decision did not address the ground on which the Fifth Circuit *en banc* majority relied: specifically, regardless of

whether the treaty is self-executing, the implementing legislation directs courts to apply the treaty as a treaty and does not thereby convert the treaty to an Act of Congress. *See* App. 19a-22a. Conversely, the Fifth Circuit found irrelevant, and hence did not decide, the issue that the *Stephens* court decided: specifically, whether the Convention is self-executing. *See* App. 15a.

The principal issue on which the Second Circuit focused in *Stephens* was "whether an anti-arbitration provision in the Kentucky Insurers Rehabilitation and Liquidation Law is enacted 'for the purpose of regulating the business of insurance'" for the purpose of the McCarran-Ferguson Act. 66 F.3d at 42. The discussion of self-execution, at the end of the decision, appears as almost an afterthought, occupying only half a page, nearly half of which is consumed by a lengthy quotation from *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 313-14 (1829), *overruled on other grounds by United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). *See Stephens*, 66 F.3d at 45. The Second Circuit assumed, without explanation, that non-self-execution meant that the courts were only applying the implementing legislation, not the treaty. *Stephens* did not even address the express words of the implementing legislation, which make clear, as the Fifth Circuit held in the present case, that courts must apply the Convention according to its terms. Thus, the circuit split that appears at first blush does not in fact exist.[2]

[2] LSAT also cites *Suter v. Munich Reinsurance Co.*, 223 F.3d 150 (3d Cir. 2000). Pet. 15. However, contrary to the impression that LSAT's brief attempts to create, the Third Circuit in *Suter* also did not reach *either* the question

Further, 14 of the 18 judges of the *en banc* Fifth Circuit found the statutory language controlling on the point that *Stephens* did not address. There is no reason to doubt that the Second Circuit would also reach the same result, were the Second Circuit to consider the point in light of the Fifth Circuit's decision below. That expectation is reinforced by the results reached in the federal district courts, as all but one of the district courts in other circuits to have decided the question since *Stephens* have concluded, as did the Fifth Circuit, that the McCarran-Ferguson Act does not permit state law to preempt the New York Convention. *See Certain Underwriters at Lloyd's, London v. Simon*, No. 1:07-cv-0899-LJM-WTL, 2007 WL

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that the Fifth Circuit decided in the present case *or* the question that the Second Circuit decided in *Stephens*. Rather, *Suter* merely rejected an argument that the state insurance law was inconsistent with the Convention's implementing legislation. *Id.* at 161-62. It therefore was unnecessary for the Third Circuit to consider—and that court did not address—whether the Convention should be treated as a treaty separate from its implementing legislation. LSAT also cites language in *Hopson v. Kreps*, 622 F.2d 1375, 1380 (9th Cir. 1980), and a concurring opinion in *The Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006) (Kavanaugh, J., concurring). Pet. 15-16. However, the point that those opinions addressed has nothing to do with the McCarran-Ferguson Act, the New York Convention or the New York Convention's implementing legislation; they instead considered whether implementing legislation that is *inconsistent* with a treaty (in *Fund for Animals*, the Migratory Bird Treaty, and in *Hopson*, the International Whaling Convention), should be allowed to supersede the treaty itself, an issue not present here. Finally, the academic commentary cited by the Fifth Circuit dissent, App. 59a-61a, is irrelevant, because it also does not address the McCarran-Ferguson Act or the particular language of the New York Convention's implementing legislation.

3047128, at *4-*7 (S.D. Ind. Oct. 18, 2007); *Murphy Oil USA, Inc. v. SR Int'l Bus. Ins. Co.*, No. 07-CV-1071, 2007 WL 2752366, at *3-*4 (W.D. Ark. Sept. 20, 2007) (finding reasoning of *Stephens* "doubtful"); *Goshawk Dedicated Ltd. v. Portsmouth Settlement Co. I*, 466 F. Supp. 2d 1293, 1304-06 & n.9 (N.D. Ga. 2006) (finding *Stephens* "unpersuasive"); *Antillean Marine Shipping Corp. v. Through Transport Mut. Ins., Ltd.*, No. 02-22196-Civ, 2002 WL 32075793, at *3 (S.D. Fla. Oct. 31, 2002). *But see Transit Cas. Co. v. Certain Underwriters at Lloyd's of London*, No. 96-4173-cv-2, 1996 WL 938126, at *2 (W.D. Mo. June 10, 1996) (not considering whether a treaty should be regarded differently from an Act of Congress). And none of these courts has held that the outcome turns on self-execution or non-self-execution.

In short, the Fifth Circuit is the only federal court of appeals to have directly ruled on the dispositive issue below, and there is no real conflict among the courts of appeals. Hence, there is no reason for this Court to take up the question before the other circuits have had a chance to consider the Fifth Circuit's forceful and well-reasoned exposition of the issues. The lower courts do not need this Court's guidance at this point, and this Court has no reason to take up the question now.

B. The Second Circuit's Decision in *Stephens v. American International* Does Not Reflect That Court's Current Thinking.

In any event, *Stephens* does not represent the current state of Second Circuit law. The very same year that *Stephens* was decided, another panel of the Second Circuit Court of Appeals called the

reasoning of that decision into question. In its detailed and carefully reasoned opinion in *National Distillers*, the Second Circuit held that the McCarran-Ferguson Act did not permit states to reverse-preempt the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 ("FSIA").

In *National Distillers*, the Second Circuit held that the McCarran-Ferguson Act simply does not apply to "a federal law that clearly intends to preempt all other state laws." 69 F.3d at 1233. Further, the Second Circuit reasoned that

> the international-law origins of the FSIA, so different from the kind of congressional statutory action that the McCarran-Ferguson Act was enacted to deal with, virtually compel the conclusion that the McCarran-Ferguson Act should not be interpreted to exclude insurance companies from the FSIA's requirements of sovereign immunity.

Id. at 1231.

The *National Distillers* panel noted the tension between this holding and the result in *Stephens*. The panel concluded, however, that it "need not consider whether the [holding] is in conflict with the holding of [*Stephens*]," because the *National Distillers* holding was also supported by an alternative ground, namely that the state insurance law would have been preempted by federal law even prior to the enactment of the McCarran-Ferguson Act. *Id.* at 1233 n.6; *see id.* at 1233-34. The inconsistency between the two results, however, is undeniable: if a rule of "international-law origins," embodied in legislation, does not trigger the McCarran-Ferguson Act, *National Distillers*, 69

F.3d at 1231, then *Stephens*, which failed to consider the issue, was wrong that a state law can reverse-preempt either the New York Convention or its implementing legislation, and the Fifth Circuit in the present case plainly reached the right result.[3]

This Court has recognized that an inconsistency between two or more panels in the same circuit is not a sufficient reason for this Court to grant certiorari. *See* Sup. Ct. R. 10(a); *see also Davis v. United States*, 417 U.S. 333, 340 (1974); *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (*per curiam*). Rather, "contrary decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself." Justice John M. Harlan, *Manning the Dikes*, 13 RECORD OF ASS'N OF BAR OF CITY OF N.Y. 541, 552 (1958).

The Second Circuit should be allowed to resolve the split between its own panels in an appropriate future case. After more careful consideration than it was able to devote in *Stephens*, the Second Circuit may well follow the reasoning of *National*

[3] The result in *Stephens* also is in tension with the later decision in *Smith/Enron Cogeneration Limited Partnership, Inc. v. Smith Cogeneration International, Inc.*, 198 F.3d 88, 96 (2d Cir. 1999). That case held, outside the McCarran-Ferguson Act context, that state law has no application in cases that fall within the federal courts' jurisdiction by reason of the New York Convention's implementing legislation. *See id.* at 96 ("When we exercise jurisdiction under Chapter Two of the FAA, we have compelling reasons to apply federal law . . . to the question of whether an agreement to arbitrate is enforceable.").

Distillers and reach the same result as the Fifth Circuit reached here. Should a real conflict between the Second and Fifth Circuits eventually emerge, the Court will be able to consider whether the case warrants review at that time.

C. No Current Conflict Exists on the Self-Execution Issue.

Even if LSAT is correct in its view that self-execution or non-self-execution is relevant here, the Second Circuit's opinion on this issue in *Stephens* predated recent developments in the law. In particular, *Stephens* was decided without the benefit of this Court's decision in *Medellín v. Texas*, 552 U.S. 491 (2008), which substantially clarified the test for determining whether treaties are self-executing—that is, enforceable as domestic law in the U.S. courts. *Stephens* failed to apply the analysis that this Court later adopted in *Medellín*.

In *Medellín*, this Court was confronted with the question of whether Article 94 of the United Nations Charter was self-executing. That article provides that each member of the United Nations "undertakes to comply" with judgments of the International Court of Justice. The Court held that "[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text," *Medellín*, 552 U.S. at 506, and that courts should look to the text of a treaty to determine whether it contains a direction for judicial enforcement or a call for future legislative action, *id.* at 508. The Court in *Medellín* concluded that the words "undertakes to comply" in UN Charter Article 94 imply an agreement to take future action, not a

direction to the courts to apply International Court of Justice judgments directly. *Id.*

In the present case, as Judge Clement pointed out in her concurrence, the Convention contains an express direction to the courts of each state party. In particular, the New York Convention provides, in relevant part, that "[t]he *court* of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, *shall*, at the request of one of the parties, refer the parties to arbitration." New York Convention, Art. II(3) (emphasis added). As Judge Clement aptly stated, "[t]he terms of Article II do not merely describe arbitration rights which are of a nature to be enforced in a court of justice, but expressly instruct courts to enforce those rights by referring the parties to arbitration." App. 45a (internal quotation marks omitted). Under *Medellín*, that direction to the courts establishes that the treaty provision is self-executing. 552 U.S. at 508.

This is not a point that the Second Circuit has ever had a chance to consider. The Second Circuit in *Stephens* relied on language in *Foster v. Neilson* that a treaty is self-executing "*whenever it operates of itself*, without the need of any legislative provision," and from that language concluded that the mere existence of implementing legislation made the treaty non-self-executing. *Stephens*, 66 F.3d at 45 (quoting *Foster*, 27 U.S. (2 Pet.) at 313-14) (court's emphasis). However, the question of whether the mere existence of implementing legislation makes a treaty wholly non-self-executing simply was not at issue in *Foster*, which involved a treaty for which Congress had failed to

enact implementing legislation. *Foster*, 27 U.S. (2 Pet.) at 315. Nor did the Second Circuit undertake the analysis now mandated by *Medellín*, which requires a court to look to the words of the treaty itself to determine if it is self-executing. *Medellín*, 552 U.S. at 506. Petitioner contends that language in *Medellín* supports the conclusion that the New York Convention is non-self-executing. Pet. 18 n.4 (citing 552 U.S. at 521-22). *But see infra* Part III.D. That language, however, has never been considered by the Second Circuit or any other federal court of appeals, including the court below.

Under Second Circuit case law, a panel of that court has authority to "reconsider a prior panel's holding if . . . an intervening Supreme Court decision . . . casts doubt on [the earlier panel's] controlling precedent." *Loyal Tire & Auto Center, Inc. v. Town of Woodbury*, 445 F.3d 136, 145 (2d Cir. 2006). Were the Second Circuit to revisit the issue in light of this Court's subsequent decision in *Medellín*, it could well agree with Judge Clement's conclusion in her concurrence that Article II(3) of the New York Convention is self-executing, and that its own earlier decision in *Stephens* is therefore wrong. The Second Circuit should be given an opportunity to consider, in the first instance, whether its own earlier precedent in *Stephens* is inconsistent with this Court's holding in *Medellín*.

II. This Case Is an Inappropriate Vehicle for Deciding the Question Presented.

A. Issues of Waiver Interfered with the Fifth Circuit's Consideration of the Question Presented and, in the Fifth Circuit Dissenters' View, Could Prevent This Court from Reaching the Question.

The Fifth Circuit majority held that self-execution was not relevant to the issues before it. App. 15a. However, the Fifth Circuit dissenters agreed with LSAT's view that self-execution or non-self-execution was dispositive. App. 66a; LSAT En Banc Br. 27-45. The dissenters further took the view that Underwriters had waived the argument that the Convention was self-executing. App. 81a n.31. As a result of their views on waiver, the dissenters stated that "[t]he question of whether or not the treaty is self-executing is not before the court," App. 50a n.1, and accordingly did not answer the question whether any part of the Convention was self-executing. Rather, the dissenters concluded that they were constrained to answer a hypothetical question: *Assuming* that the New York Convention is wholly non-self-executing, *would* the McCarran-Ferguson Act bar enforcement of the Convention? *See* App. 81a n.31. The concurring judge, Judge Clement, also had to consider the waiver issue before reaching the issue of self-execution. App. 39a n.2.

Thus, if the dissenters are correct (which Underwriters dispute), this case does not squarely present the question that LSAT now portrays as warranting this Court's review. If the Court were to decide—like the dissent below—that it cannot

reach the issue of whether the New York Convention is self-executing, but were to agree with LSAT and the dissent that the issue is dispositive, then it will be unable to resolve either the question that LSAT presents in its petition or the alleged inconsistency between the Fifth Circuit's decision below and the Second Circuit's decision in *Stephens*. In that circumstance, this Court's decision could end up having no application in *any* future case. This Court does not generally grant certiorari to resolve academic or hypothetical questions, or to decide issues that may be unique to the parties in a particular case.

Moreover, partly because of the waiver issue, only *one* of the 18 judges on the Fifth Circuit, Judge Clement, actually decided whether the relevant provision of the New York Convention is self-executing. But that is the question that LSAT contends is dispositive. Courts of appeals in future cases will have an opportunity to consider that question, if it is relevant, without the complications created by the alleged waiver here, with which the Fifth Circuit concurrence and dissent both struggled. This Court will then have the benefit of the reasoning of the courts of appeals in considering the question that LSAT is attempting to present. If, as LSAT states, the question raised by its petition is "important and recurring," Pet. 2, then this Court will have ample opportunity to address it in future cases that are better postured for review.

B. The Question Presented Arises Only Infrequently in the District Courts, but Should It Recur, There Would Be No Impediments to Appellate Review.

Apparently anticipating a challenge to the suitability of this case for review, LSAT argues that the interaction between the McCarran-Ferguson Act and the New York Convention "frequently" arises at the district court level, Pet. 14, but seldom makes it to the court of appeals level because it is often addressed in a "nonfinal" or "unreviewable" order. Pet. 1. LSAT is incorrect, both as to the frequency with which the issue arises and the availability of appellate review.

Despite LSAT's repeated claim that the relationship between the McCarran-Ferguson Act and the New York Convention "arises frequently," LSAT only cites two district court cases in which the issue was decided. Pet. 25 (citing *Murphy Oil*, 2007 WL 2752366, at *3; *Transit Casualty*, 1996 WL 938126, at *2). Underwriters are aware of only three additional district court cases outside the Fifth Circuit, not cited by LSAT but all decided adversely to LSAT, which reached the issue in the 15 years since the *Stephens* decision. *Simon*, 2007 WL 3047128, at *4-*7; *Goshawk*, 466 F. Supp. 2d at 1304-05 & n.9; *Antillean Marine*, 2002 WL 32075793, at *3. LSAT therefore has no basis to claim that the issue "arises frequently" in the federal district courts. Pet. 25.

LSAT also has no basis for its argument that the issue is likely to evade appellate review. Pet. 26-29. An issue involving arbitration can reach the appellate level at least as readily, if not more so, than other legal issues.

First, a party aggrieved by the denial of a motion to compel arbitration may take an immediate interlocutory appeal, as a matter of right, to the court of appeals. *See* 9 U.S.C. § 16(a)(1); *Arthur Andersen LLP v. Carlisle*, 556 U.S. —, 129 S. Ct. 1896, 1900 (2009). Petitioner simply ignores Section 16(a)(1), instead stating incorrectly that such an order "cannot be appealed" unless the district court certifies and the court of appeals accepts an interlocutory appeal under 28 U.S.C. § 1292(b). Pet. 27. Although the procedure under 28 U.S.C. § 1292(b) was followed in this case, that step was not necessary.

Second, a final judgment granting a motion to compel arbitration also is immediately appealable. *See* 9 U.S.C. § 16(a)(3). Since this Court's decision in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), a final appealable judgment arises not only every time a district court decides an "independent" proceeding to compel arbitration, but also when a district court dismisses an action with an "embedded" arbitration issue on the ground that the claims are subject to arbitration. *Id.* at 87-89. Again, petitioner simply ignores the express statutory authorization provided by Section 16(a)(3).

Third, as with any other issue, the issue of whether the New York Convention preempts state insurance law can be raised on appeal from a final judgment on the merits. In particular, a party resisting arbitration may appeal from a final judgment enforcing an arbitration award. *See* 9 U.S.C. § 16(a)-(b); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 948 (1995). Once again, petitioner fails to acknowledge that prospect.

Fourth, even if the arbitration issue is addressed in "an order remanding the case to state court for lack of federal jurisdiction [which is] unreviewable pursuant to 28 U.S.C. § 1447(d)," Pet. 28, the federal court's decision is final only as to the question of its own jurisdiction. The state courts can revisit the substantive issue of whether the New York Convention preempts state law. *See, e.g., Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398, 405 (7th Cir. 2001) (after remand, state court is not bound to follow substantive rulings underlying district court's remand decision); *In re Loudermilch*, 158 F.3d 1143, 1147 (11th Cir. 1998) (same); *BT Sec. Corp. v. W.R. Huff Asset Mgmt. Co.*, 891 So. 2d 310, 316 & n.1 (Ala. 2004) (same; holding state law preempted, contrary to federal court's remand decision). This Court can then review the issue by certiorari from a final judgment of the highest appellate court of the state. Yet again, petitioner fails to acknowledge this route to appellate review and review by this Court.

Finally, as petitioner does acknowledge, if the issue is controlling and unsettled, the district court may certify an interlocutory appeal under 28 U.S.C. § 1292(b), precisely as it did here.

LSAT's assertion that the question it seeks to present arises frequently in the district courts, but somehow will evade appellate review, is therefore wholly unfounded. Should the issue recur as LSAT predicts, then this Court will have additional opportunities to review it, after further percolation in the lower courts.

III. The Petition Raises No Important Federal Question, Because the Decision Below Is Plainly Correct.

In the end, the decision of the *en banc* Fifth Circuit is straightforward and follows directly from statutory language and this Court's precedents, as the Fifth Circuit's near-unanimity suggests. Petitioner argues that the Fifth Circuit did not properly interpret the New York Convention's implementing legislation and the McCarran-Ferguson Act. Pet. 17-21. Petitioner, however, fails to take adequate account of the plain statutory language or give any weight to the facts that the Convention is an Article II treaty, that the Convention's implementing legislation applies only to international commercial contractual relationships, and that the McCarran-Ferguson Act only overcomes domestic legislation under Article I and does not impair the federal government's ability to negotiate and enforce agreements with foreign nations. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 428 (2003).

A. The Decision Below Follows Easily from the Plain Language of the Statutes and Treaty.

As LSAT concedes, in interpreting a statute, a court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (plurality opinion). The same is true of the text of a treaty. *Medellín*, 552 U.S. at 506. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*,

503 U.S. 249, 253-54 (1992) (quoted in Pet. 17). Contrary to what LSAT argues, that is exactly what the Fifth Circuit did.

The court's careful analysis of the text of the Convention, its implementing legislation, and the McCarran-Ferguson Act all led to the conclusion that the McCarran-Ferguson Act does not authorize Louisiana to reverse-preempt Article II(3) of the Convention. App. 6a, 15a-22a. The Fifth Circuit observed that "[t]he Convention contemplates enforcement in a signatory nation's courts, directing that courts 'shall' compel arbitration when requested by a party to an international arbitration agreement." App. 8a. The Fifth Circuit analyzed the text of the Convention's implementing legislation, which "states that *the Convention* 'shall be enforced in United States courts in accordance with this chapter.'" *Id.* (emphasis added). And the Fifth Circuit reviewed the language of the McCarran-Ferguson Act, which it quoted as saying:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> . . .
>
> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such

> business, unless such Act specifically relates to the business of insurance. . . .

App. 9a (quoting 15 U.S.C. §§ 1011, 1012(b)).

Thus, by applying the plain statutory text, the Fifth Circuit correctly concluded that the only issue to determine was "whether Louisiana law overrides the Convention's requirement that the present dispute be submitted to arbitration because [the court] construe[s] an act of Congress to invalidate, impair, or supersede state law." App. 12a. And, based on the plain text of the McCarran-Ferguson Act as well as "the terms of the Convention Act," the court held that "Congress did not intend the term 'Act of Congress,' as used in the McCarran-Ferguson Act, to reach a treaty such as the Convention." App. 18a.

LSAT argues that, because the treaty was implemented by a statute, courts are necessarily enforcing *only* the statute and not the treaty. But legislative implementation of a treaty does not make the treaty itself a statute. Nothing in the New York Convention's implementing legislation purports to supplant the operative terms of the treaty with the terms of the statute. For example, the New York Convention's implementing legislation does not contain substantive domestic-law provisions intended to satisfy a general standard prescribed in a treaty. Rather, the implementing legislation simply provides that the "Convention . . . *shall be enforced*." 9 U.S.C. § 201 (emphasis added). The substantive standards to be applied are set forth in the Convention itself, not in the implementing legislation. *See id.*; *see also id.* § 207. The implementing legislation merely adds jurisdictional and procedural provisions, designed

to bring Convention cases into the federal courts and prescribe the technical form of the proceedings. *See id.* §§ 203-208.[4] Thus, a court in a New York Convention case is construing the Convention itself, not the implementing legislation. LSAT's position therefore is flatly inconsistent with the language of the McCarran-Ferguson Act, which only purports to limit decisions "construe[ing]" Acts of Congress, 15 U.S.C. § 1012(b), not decisions construing treaties, regardless of whether those treaties are being applied under the direction of an Act of Congress or of their own force.

B. The Decision Below Also Follows Easily from the History and Purpose of the McCarran-Ferguson Act and This Court's Decision in *American Insurance Association v. Garamendi*.

If there were any doubt about the meaning of the text of the relevant statutes and treaty, the history and purpose of the McCarran-Ferguson Act would make the result plain. As this Court has repeatedly recognized, when a court finds a statute ambiguous, it should consider the history and purpose of the legislation in determining the

[4] The only arguably substantive provision in the implementing legislation, 9 U.S.C. § 202, defines what it means for an arbitration in the United States to be "domestic" and therefore not subject to the Convention, because that is a point on which the New York Convention looks to domestic law. *See* New York Convention Art. I(1) (Convention "shall . . . apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought"). That provision is not at issue in the present case.

meaning of the statute. *See, e.g.*, *Corley v. United States*, 556 U.S. —, 129 S. Ct. 1558, 1568-1570 (2009) (reviewing drafting history and other indications of legislative purpose to determine Congress's intent to limit *McNabb-Mallory* rule); *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229, 2243 (2008) (considering "litigation history that prompted Congress to enact" the Military Commissions Act of 2006).

The McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, was adopted in 1945 in response to this Court's decision in *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), which held for the first time that the interstate business of insurance was "commerce." *See Humana Inc. v. Forsyth*, 525 U.S. 299, 306 (1999). Concerned that Acts of Congress regulating interstate commerce might inadvertently undermine state regulation of the business of insurance, Congress enacted the McCarran-Ferguson Act. *Id.* at 306. Section 2(b), the part of the Act at issue in this case, "ensured that federal statutes not identified in the Act or not yet enacted would not automatically override state insurance regulation." *Humana*, 525 U.S. at 306. As one of the Act's sponsors explained in debate on the Senate floor, "[w]hat we have in mind is that the insurance business, being interstate commerce, if we merely enact a law relating to interstate commerce, or if there is a law now on the statute books relating in some way to interstate commerce, it would not apply to insurance." 91 Cong. Rec. 1487 (1945) (remarks of Sen. Ferguson).

However, it was always the case that treaties entered into by the United States—and legislation

enacted by Congress to implement treaties—could preempt state laws, even if no commerce was involved. *See Missouri v. Holland*, 252 U.S. 416, 433 (1920) (holding that Congress's power to implement treaties was not confined by the commerce power); *see also United States v. Pink*, 315 U.S. 203, 229-31 (1942) (holding that state insurance law is preempted by federal foreign-affairs power). In acting to protect state insurance regulation from inadvertent preemption by general federal regulation of commerce, Congress clearly did not mean to give each state new authority to override international agreements entered into under the Article II treaty power. As the Fifth Circuit concluded:

> [It is] unlikely that when Congress crafted the McCarran-Ferguson Act, it intended any future treaty implemented by an Act of Congress to be abrogated to the extent that the treaty conflicted in some way with a state law regulating the business of insurance if Congress's implementing legislation did not expressly save the treaty from reverse-preemption by state law. If this had been Congress's intent, it seems probable that Congress would have included a term such as "or any treaty requiring congressional implementation" following "Act of Congress" and "such Act" in the McCarran-Ferguson Act. There is no indication in the McCarran-Ferguson Act that Congress intended, through the preemption provision and the use of the term "Act of Congress," to restrict the United States' ability to negotiate and

> implement fully a treaty that, through its application to a broad range of international agreements, affects some aspect of international insurance agreements.

App. 29a-30a.

In *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003), this Court made clear that the McCarran-Ferguson Act ends where the foreign-relations power begins. In *Garamendi*, the Court held that certain executive agreements between the United States and European countries, which recognized an exclusive forum and remedy for Holocaust-era insurance claims, preempted a California statute requiring insurers doing business in the state to disclose information about policies sold in Europe between 1920 and 1945. In reaching this holding, this Court rejected California's argument that Congress, through the McCarran-Ferguson Act, had authorized state laws such as the one at issue:

> As the text itself makes clear, the point of McCarran-Ferguson's legislative choice of leaving insurance regulation generally to the States was to limit congressional preemption under the commerce power, whether dormant or exercised. . . . [A] federal statute directed to *implied* preemption by *domestic commerce legislation* cannot sensibly be construed to address preemption by executive conduct in foreign affairs.

539 U.S. at 428 (emphasis added).

The reasoning of *Garamendi* directly applies here. A ratified treaty, made by the President

with the advice and consent of the Senate as specified in Article II of the Constitution, involves "executive conduct in foreign affairs," *Garamendi*, 539 U.S. at 428, even more clearly than the informal executive agreements on Holocaust reparations that were at issue in *Garamendi*. The fact that the President ratified the treaty with the consent of the Senate as specified in Article II *and* Congress implemented it by legislation under Article I should only strengthen, not weaken, the enforceability of the treaty. *See Medellín*, 552 U.S. at 527. In light of the holding of *Garamendi*, LSAT cannot seriously suggest that the McCarran-Ferguson Act, designed to limit "implied preemption by domestic commerce legislation," *Garamendi*, 539 U.S. at 428, was meant to allow states to override the concerted foreign policy efforts of the executive and legislative branches.

LSAT's proposed distinction between implemented and unimplemented treaties would allow the McCarran-Ferguson Act to override a treaty if both houses of Congress enact a statute that directs courts to enforce the treaty, but would allow the treaty to prevail if the Senate alone, in its resolution consenting to ratification, declared that the treaty should be enforced by the courts without implementing legislation. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004) (enforcing Senate declaration that treaty was non-self-executing); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111(4)(b), 303 cmt. d, 314 cmts. b & d (1987) (stating that such declarations are binding). In both cases, the intent and effect should be the same: the competent political branch of government is directing the courts to enforce an inter-

national obligation embodied in a treaty. LSAT's formalistic attempt to draw a distinction between these two situations makes no practical sense. If anything, a treaty that has *both* been ratified by consent of two-thirds of the Senate *and* been implemented by legislation passed by both houses of Congress should have a *stronger* claim to enforcement than a treaty that has been approved by the Senate alone.

C. LSAT's Argument Misstates the Impact of the Fifth Circuit's Decision and Fails to Take Account of the International Character of the Transaction.

LSAT also argues that the Fifth Circuit's decision means that an alien insurer could come to Louisiana and impose a "preprinted form polic[y]," with a clause calling for arbitration in a distant place, on an unsophisticated consumer. Pet. 22-23. In fact, LSAT is not a consumer but a large entity that itself is in the insurance business. LSAT's suggestion that the decision below will affect consumers is simply not true, as nothing in the decision in any way addresses Louisiana's authority to regulate ordinary insurance transactions within its borders. If a foreign or alien insurer is admitted to issue insurance in Louisiana, nothing in the decision below "throws into doubt," Pet. 22, Louisiana's ability to require it to comply with state laws dictating the content of insurance contract forms. The decision below is relevant to, at most, reinsurance and excess and surplus lines insurance (whether written on the "Bermuda Form" or otherwise) purchased from a non-admitted insurer located overseas. Moreover, the United

States, as authorized by Article I(3) of the Convention, has specifically limited its application to "commercial" contracts. *See* 9 U.S.C. § 202.

Moreover, in seeking to inflate the impact of the Fifth Circuit's decision, LSAT asserts that "[a]t least 13 states have enacted laws that prohibit enforcement of arbitration clauses in insurance disputes." Pet. 21 & n.6. LSAT is incorrect. The contract between LSAT and Underwriters is a contract of reinsurance, not primary insurance. *See La. Safety Ass'n of Timbermen—Self Insurers Fund v. La. Ins. Guar. Ass'n*, 17 So. 3d 350, 359 (La. 2009). Only six of the state laws that LSAT cites, counting Louisiana's, could by their terms potentially apply to a reinsurance contract like the one between LSAT and Underwriters. *See* Ark. Code Ann. § 16-108-201(b)(2); Haw. Rev. Stat. § 431:10-221; La. Rev. Stat. Ann. § 22:868; S.C. Code Ann. § 15-48-10(b)(4); Va. Code Ann. § 38.2-312; Wash. Rev. Code § 48.18.200. Seven others specifically exclude reinsurance from their scope. Ga. Code Ann. § 9-9-2; Kan. Stat. Ann. § 5-401; Ky. Rev. Stat. Ann. § 417.050; Mo. Rev. Stat. § 435.350; Neb. Rev. Stat. § 25-2602.01; R.I. Gen. Laws § 10-3-2;[5] S.D. Codified Laws § 21-25A-3. LSAT also cites four others, but acknowledges that they apply only to health and auto insurance. Pet. 22 n.7.

LSAT also attempts to obscure the international character of its transaction with Underwriters. LSAT sought out reinsurance not only outside of

[5] The Rhode Island statute permits arbitration clauses even in primary insurance contracts, as long as formal requirements regarding placement of the arbitration clause are satisfied. R.I. Gen. Laws § 10-3-2.

Louisiana but outside the United States. It approached Underwriters in London, England, through two sophisticated intermediaries, including one based in the United Kingdom. As a result, the parties entered into a negotiated transaction that included a mutually agreed arbitration clause. Having sought the benefits of doing business in the international market, LSAT cannot now insist on the "parochial concept that all disputes must be resolved under our laws and in our courts." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972). Even if LSAT's arguments for the application of state law had merit in regard to domestic transactions, they could not apply to the "truly international agreement" that LSAT entered into with Underwriters. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 515 (1974). As this Court has held,

> concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement [to submit disputes to arbitration], *even assuming that a contrary result would be forthcoming in a domestic context.*

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985) (emphasis added). Thus, LSAT's repeated reliance on case law under Chapter 1 of the Federal Arbitration Act, 9 U.S.C. §§ 1-16, which deals with domestic arbitration, *see, e.g.*, Pet. 5 n.1, completely misses the point.

Furthermore, this case involves not only an international contract but a treaty obligation. This Court has repeatedly recognized that Congress is presumed to intend to comply with international obligations, and that an Act of Congress—such as the McCarran-Ferguson Act here—should not be construed to override an international treaty obligation, self-executing or otherwise, if another construction is possible. *See, e.g.*, *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). "If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements." *Vimar*, 515 U.S. at 539.

Even more clearly, Congress cannot have intended to authorize the individual states to create havoc with national foreign policy by allowing them to opt out, on a piecemeal basis, from treaty obligations that the United States entered into with foreign nations and explicitly directed the federal courts to enforce. This Court has long recognized that "'[i]n international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power.'" *Japan Line, Ltd. v. County of L.A.*, 441 U.S. 434, 448 (1979) (quoting *Bd. of Trs. of Univ. of Ill. v. United States*, 289 U.S. 48, 59 (1933)). And as discussed, this Court recognized in *Garamendi* that the McCarran-Ferguson Act does not permit the states to interfere with the conduct of

United States foreign policy through international agreements. *Garamendi*, 539 U.S. at 428. LSAT's attack on the Fifth Circuit's *en banc* decision disregards this fundamental principle.

For these reasons, nothing in the decision below calls into question Louisiana's authority to protect local consumers and businesses involved in common domestic insurance transactions in Louisiana, even with insurers based out of state or overseas. Of course, if LSAT's hypothetical parade of horribles somehow did come to pass in the future, nothing would prevent this Court from reviewing the issue at that time. The Fifth Circuit's decision below presents none of those concerns.

D. If Self-Execution Is Relevant, Article II(3) of the New York Convention Is Clearly Self-Executing.

Finally, as Judge Clement concluded in her opinion concurring in the judgment, Article II(3) of the New York Convention plainly is self-executing. Judge Clement also correctly concluded that the issue of self-execution was preserved for *en banc* review because it was fairly encompassed in Underwriters' brief to the three-judge panel, treated by the panel as having been presented, and addressed by LSAT in its *en banc* brief. App. 39a n.2.

By its unambiguous language, Article II(3) is addressed in mandatory terms to "[t]he court of a Contracting State." New York Convention, Art. II(3). That provision is expressly a "directive to domestic courts," not to a legislature or executive. *Medellín*, 552 U.S. at 508. Thus, under this

Court's decision in *Medellín*, it is self-executing. *Id.* The fact that Congress thought implementing legislation was desirable to provide federal jurisdiction for New York Convention cases, or may even have thought implementing legislation necessary to give effect to other provisions of the Convention besides Article II(3), *see* Pet. 19 n.4, has nothing to do with whether Article II(3) of the Convention would have been operative on its own in the absence of implementing legislation.

LSAT points to language in *Medellín* that "Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes. . . . The judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress," followed by a citation to, among other provisions, the implementing legislation for the New York Convention. *Medellín*, 552 U.S. at 521-22, *quoted in* Pet. 18 n.4. However, the self-executing nature of the New York Convention was not at issue before the Court in *Medellín*; rather, the Court was simply making the point that Congress had provided by statute for the enforcement of arbitral awards in various contexts. As this Court has cautioned in the past, passing comments in the Court's opinions cannot bear the heavy weight that parties sometimes seek to put on them. *See, e.g., Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008); *Rivet v. Regions Bank of La.*, 522 U.S. 470, 477 (1998).

Moreover, the quoted language from *Medellín* makes clear that the Court was referring to the enforcement of "judgments" of international tri-

bunals—that is, the enforcement under Articles III-VI of the Convention of final arbitral *awards*, not the enforcement under Article II of *agreements to arbitrate*. Article II, which imposes the obligation to recognize and enforce qualifying agreements to arbitrate, contains an express reference to "court[s]." By contrast, the award-enforcement provisions of the Convention never mention the word *court*, but only refer to the "competent authority" and leave to each country's own law the task of designating that authority. New York Convention Art. V(1)-(2), VI. Because the provision at issue here, Article II(3), refers explicitly to "court[s]," it is self-executing under the test that this Court articulated in *Medellín*.

The legislative history cited by LSAT, even if relevant, does not suggest otherwise. The Department of State's testimony in support of ratification of the Convention merely stated that implementing legislation was "desirable." S. Exec. Rep. No. 90-10, App., at 5 (1968) (testimony of Amb. Richard D. Kearney of the State Department's Office of the Legal Advisor). The message from the President to the Senate, paraphrased in the Committee report, stated that "[c]hanges in title 9 . . . will be required before the United States becomes a party to the [C]onvention." 114 Cong. Rec. 10488 (1968) (message from the President), *cited in* S. Exec. Rep. No. 90-10, *supra*, at 2. However, the State Department made clear that the reason legislation was needed was "to insure the coverage of the [Federal Arbitration Act] extends to all cases arising under the treaty" and "to take care of related venue and jurisdictional requirement problems"—not because the Convention would have been inoperative in the absence of legisla-

tion. S. Exec. Rep. No. 90-10, *supra*, App., at 6. And in fact, all that the implementing legislation did was to bring Convention cases under the procedures of the Federal Arbitration Act, 9 U.S.C. §§ 206-208, prescribe a statute of limitations for enforcement of awards, *id.* § 207, and take care of federal jurisdiction and venue uncertainties, *id.* §§ 203-205. For substantive provisions, it refers the courts to the treaty itself. *Id.* §§ 201, 207; *see supra* Part III.A. LSAT's assumption that the mere existence of implementing legislation necessarily means that each and every provision of the treaty is non-self-executing—in other words, that it would have no force without the legislation—is therefore unfounded.

LSAT has conceded that, if the relevant provision of the New York Convention is self-executing, then it is not an "Act of Congress," the McCarran-Ferguson Act does not apply, and Louisiana's anti-arbitration law is preempted. *See* Pet. 19-20; *see also id.* at 15-16, 18; LSAT En Banc Br. at 44-45; *Garamendi*, 539 U.S. at 428. The self-executing character of Article II(3) of the Convention thus removes the underlying premise of LSAT's petition.

CONCLUSION

For all of the foregoing reasons, Underwriters request that the petition be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LOUISIANA SAFETY ASSOCIATION OF TIMBERMEN – SELF INSURERS FUND,

Petitioner,

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF RESPONDING TO THE UNITED STATES AS *AMICUS CURIAE*

The United States acknowledges that the Fifth Circuit's decision in this case conflicts with a Second Circuit decision, and it does not dispute that the issue is important enough to warrant this Court's review. The United States devotes almost all of its brief to arguing the merits of the case, but the petition should not be denied based on its view of the merits. Regardless of whether the Court ultimately decides that the Fifth Circuit or the Second Circuit is correct, it should grant the petition and resolve the conflict.[1]

Moreover, the United States is wrong on the merits. It contends that Chapter 2 of the Federal Arbitration Act ("FAA") preempts state insurance law, notwithstanding the plain language of the McCarran-Ferguson Act, which provides that no "Act of Congress" shall preempt "any law enacted by any State for the purpose of regulating the business of insurance," unless the Act of Congress "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). As the Second Circuit correctly held, Chapter 2 of the FAA is an "Act of Congress" that does not specifically relate to insurance, and therefore it does not preempt state insurance laws. *See Stephens v. American Int'l Ins. Co.*, 66 F.3d 41 (2d Cir. 1995).

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[1] Pursuant to Rule 29.6, Petitioner states that the corporate disclosure statement in its Petition (Pet. ii) remains current.

I. THIS CASE PROVIDES AN EXCELLENT VEHICLE FOR RESOLVING THE CIRCUIT SPLIT.

The United States acknowledges that the Fifth Circuit's decision conflicts with the Second Circuit's decision in *Stephens*. U.S. Br. 17. It does not dispute the importance of the question presented. Sixteen states have enacted laws that prohibit arbitration clauses in some or all insurance contracts. *See* Pet. 21 n.6, 22 n.7. The Fifth Circuit's decision calls into question the validity of these state laws in all cases in which a policyholder contracts with a foreign insurance company.

The United States nevertheless contends that this Court's review is not warranted because: (1) the conflict "is not sufficiently developed" (U.S. Br. 17-18); (2) the applicable Louisiana law is "unclear" (*id.* at 18-20); and (3) the issue's importance is diminished in light of the recently enacted Dodd-Frank legislation (*id.* at 20-21). None of these arguments is persuasive.

1. The United States contends that this Court's review is unwarranted because of the "limited" nature of the circuit split. U.S. Br. 17. But the fact that the circuit split involves only two circuits does not demonstrate that the disagreement "is not sufficiently developed." *Id.* The Fifth Circuit's decision expressly acknowledges that it creates a circuit split (App. 34a), and the arguments for and against its position are analyzed in majority, concurring, and dissenting opinions of an *en banc* court of appeals.

In suggesting that the Court should wait until the circuit split becomes deeper, the United States ignores the reasons for deciding the issue now. District courts frequently are required to decide the question presented in this case, and those courts have recognized the "'split of authority.'" Pet. 25 (quoting *PinnOak Res., LLC v. Certain Underwriters at Lloyd's, London*, 394 F. Supp. 2d 821, 828 (S.D. W. Va. 2005)). Although the issue arises frequently, it typically does so when the foreign insurer moves to compel arbitration or when it removes a state court action to federal court. *See* Pet. 26-28. In either case, the district court's decision typically is not subject to appellate review, regardless of how the court rules. *Id.* As a result, the issue rarely reaches the appellate courts. Indeed, the issue reached the court of appeals in this case and in *Stephens* only because the district courts took the unusual step of certifying the issue for interlocutory appeal under 28 U.S.C. § 1292(b). The United States does not dispute the frequency with which the issue faces district courts or the difficulty in obtaining appellate review. Instead, it simply ignores these points.

Nor should the Court wait to resolve the conflict based on speculation that the Second Circuit "might" reconsider its decision in *Stephens* "in light of the government's view, as expressed in this brief." U.S. Br. 17. For the purpose of interpreting a treaty, the relevant views of the government are the positions taken by the President and Senate in signing and ratifying the agreement (*see Medellin v. Texas*, 552 U.S. 491, 510-11 (2008))—not litigating positions taken decades later by the Department of Justice. As discussed below, the President and Senate clearly

viewed the Convention as non-self-executing. *See* pp. 7-9 *infra*.[2]

2. Contrary to the United States' assertion (U.S. Br. 18-19), there is no dispute that Louisiana law prohibits arbitration clauses in insurance contracts. The Fifth Circuit noted that "[t]he parties agree that requiring arbitration of the present dispute in compliance with the Convention would contravene the Louisiana statute" (Pet. App. 8a-9a), and Respondent has acknowledged in this Court (Opp. 29) that the Louisiana statute covers the insurance policies at issue here.

Nor is there any basis for the United States' speculation that the Louisiana Supreme Court might interpret the state statute differently. For 45 years, it has been clear that arbitration clauses in insurance contracts are unenforceable under Louisiana law. *See Macaluso v. Watson*, 171 So. 2d 755, 757-58 (La. Ct. App. 1965); *see also Hobbs v. IGF Ins. Co.*, 834 So. 2d 1069, 1071 (La. Ct. App. 2002). Both the Louisiana Supreme Court and the Fifth Circuit have recognized this principle. *See Doucet v. Dental Health Plans Mgmt. Corp.*, 412 So. 2d 1383, 1384 (La. 1982) ("Classification of the contract at issue as an insurance contract renders the arbitration provisions of that contract unenforceable."); *McDermott Int'l, Inc. v. Lloyds*

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[2] Contrary to the United States' contention (U.S. Br. 18), there is no "intra-circuit tension" in the Second Circuit because the holding in *Stephens v. National Distillers & Chemical Corp.*, 69 F.3d 1226 (2d Cir. 1995) is based on the fact that the Foreign Sovereign Immunities Act, unlike Chapter 2 of the FAA, expressly displaces all contrary state laws. *See* Pet. Reply Br. 3.

Underwriters, 120 F.3d 583, 585-86 (5th Cir. 1997) (Louisiana law "renders arbitration clauses in insurance policies null and void."). Indeed, no reported case has ever questioned whether arbitration clauses in insurance contracts are unenforceable under Louisiana law.[3]

3. The United States is also incorrect to argue that the issue presented in this case is less likely to arise in the future because of the recent enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376. U.S. Br. 20-21. This argument ignores the limited scope of the Dodd-Frank preemption provision, which applies only to certain "reinsurance contracts." 24 Stat. at 1595. The provision does not apply to any primary insurance contracts, or to reinsurance contracts subject to the law of the state where the "ceding insurer" is domiciled. *Id.*[4] Because the Dodd-Frank Act preempts state law only for a limited subset of insurance contracts, it will not resolve the growing number of disputes arising out of insurance contracts containing arbitration clauses. As Petitioner explained, "'arbitration provisions are appearing with increasing frequency in all types of insurance policies.'" Pet. 24 (quoting Susan Randall,

[3] Louisiana's general policy favoring arbitration, cited by the United States, predates *Macaluso*. *See* La. Rev. Stat. 9:4201 (enacted in 1948).

[4] Many insurance policies do not contain a choice-of-law provision, and general choice-of-law principles frequently lead to application of the law of the policyholder's domicile. *See, e.g.*, *Certain Underwriters at Lloyd's, London v. Foster Wheeler Corp.*, 876 N.E.2d 500 (N.Y. 2007).

Mandatory Arbitration ... Insurance Disputes: Inverse Preemption of the Federal Arbitration Act, 11 Conn. Ins. L.J. 253, 253-54 (2004-2005)).

The United States is also wrong to suggest that it is "unclear" whether the Dodd-Frank Act affects the resolution of this case. U.S. Br. 20-21. It clearly does not. The Dodd-Frank provision does not apply because Petitioner's agreement with Respondent is not a reinsurance contract. Louisiana law makes clear that a self-insurance fund (like Petitioner) is not an "insurer." *See* Workers' Compensation Group Self-Insurance Funds, 2010 La. Sess. Law Serv. Act 794 (S.B. 607) § 2. Louisiana follows the majority view, which is that self-insurance is not insurance. *See* Pet. Reply Br. 11 n. 5 (collecting cases).[5]

II. THE FIFTH CIRCUIT'S DECISION IS INCORRECT.

The United States devotes all but a few pages of its brief to arguing that the Fifth Circuit reached the correct result in this case. This argument provides no basis for denying the petition. The Court should grant the petition and resolve the circuit split regardless of whether it ultimately sides with the Fifth Circuit or the Second Circuit. In any event, the Fifth Circuit's decision is incorrect.

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[5] Because the Dodd-Frank Act "makes no mention of retroactivity," it also does not apply to cases pending at the time of its enactment. *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1406 n.1 (2010).

Conspicuously absent from the United States' discussion of the merits is a defense of the Fifth Circuit's rationale. The court of appeals thought that it was obliged "to determine if, in enacting the McCarran-Ferguson Act, Congress intended for state law to reverse-preempt federal law that has as its source an implemented non-self-executing treaty." App. 26a. Based on the federal policy favoring arbitration, the court decided that Congress must have intended to exclude acts of Congress that implement treaties from the term "Acts of Congress" in the McCarran-Ferguson Act. App. 16a-17a, 31a-34a. This approach disregards the plain language of the McCarran-Ferguson Act and established principles of statutory construction. *See* Pet. 17-21.

1. The United States argues (U.S. Br. 8-11) that Article II of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("Convention") is self-executing—a view that was unanimously rejected by the Second Circuit and adopted by only one of 18 Fifth Circuit judges. The United States takes this position notwithstanding *Medellin*'s identification of the Convention as an example of a non-self-executing treaty, and statements by the President and Senate that implementing legislation was necessary before the Convention could take effect. According to the United States, these authorities address only Article III of the Convention, and have no application to Article II (which includes the provision that conflicts with Louisiana law). This attempted distinction fails.

Nothing in *Medellin*'s discussion of the Convention suggests that the Court thought implementing legislation was only partially necessary. To the contrary, the Court cited the entirety of Chapter 2 of the FAA, which implemented all Articles of the Convention. *See* 552 U.S. at 521 (citing 9 U.S.C. §§ 201-08). The Court did not limit its citation to Sections 203-205, which the United States identifies as the provisions necessary for implementing Article III of the Convention. U.S. Br. 10-11.

The ratification history also provides no support for the view that implementing legislation was only partially necessary. When President Johnson submitted the Convention to the Senate for ratification, he made clear that that the United States would not deliver an instrument of accession until implementing legislation was enacted. *See* 114 *Cong. Rec.* S10488 (1968) (message of President Johnson) ("Changes in title 9 (arbitration) of the United States Code will be required before the United States becomes a party to the convention. The United States instrument of accession to the convention will be executed *only after the necessary legislation is enacted.*") (emphasis added). Similarly, the Senate, in giving its advice and consent, reiterated that "[c]hanges in the Federal Arbitration Act (title 9 of the United States Code) will be required *before the United States becomes a party to the convention.*" S. Exec. Rep. No. 90-10, at 2 (Sept. 27, 1968) (emphasis added). Neither the President nor the Senate suggested that the implementing legislation was necessary only for some provisions and not others. The fact that Congress enacted

legislation to implement the entire Convention confirms that it did not think that implementing legislation was only partially necessary.

The United States bases its contrary view on a statement made by a State Department legal adviser during a congressional hearing. U.S. Br. 10. According to the United States, the President's statement should be read in the "context" of the legal adviser's testimony. *Id.* But surely a subordinate official's statement should be read in the "context" of the President's statement—not the other way around. In any event, the legal adviser did not say that Article II (or any other part of the Convention) is self-executing.[6]

The United States also contends that the text of Article II supports its view, but the text does not distinguish Article II from Article III. The United States notes that Article II contains mandatory language. U.S. Br. 9. But Article III, which the United States recognizes is non-self-executing, contains the same mandatory language as Article II. *See* 21 U.S.T. at 2519 (Articles II & III begin: "Each Contracting State shall recognize . . . ."). The use of terms like "shall" weighs in favor of interpreting a treaty to be self-executing, but nothing in *Medellin* suggests that the use of mandatory language is dispositive on that issue. By arguing that Article III

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[6] The legal adviser stated that legislative changes were necessary to address jurisdictional and venue issues. U.S. Br. 10. The United States appears to interpret this statement as establishing that implementing legislation was necessary *only* to address these issues, but the legal adviser did not say that.

is non-self-executing, the United States recognizes that the use of mandatory language is not dispositive.

In short, the views of the President and Senate that signed and ratified that treaty should be given "great weight." *Medellin*, 552 U.S. at 513 (citation and internal quotation marks omitted). Because the treatymakers clearly thought that implementing legislation was necessary, and Congress enacted such legislation, the United States is wrong to take a contrary view five decades later.

2. The United States also asserts that, even if the Convention is non-self-executing, the McCarran-Ferguson Act does not apply. U.S. Br. 11-17. This position is also incorrect.

a. The United States contends that, even if the Convention is non-self-executing, it is "directly enforceable." U.S. Br. 12-13 & n.2. It bases this view on the fact that Chapter 2 of the FAA incorporates the Convention by reference. *Id.* According to the United States, it would be a "quite different" case had Congress reprinted the Convention's provisions in the U.S. Code, rather than simply referencing them. *Id.* at 12 n.2. Because Congress incorporated the Convention by reference, the United States contends, it can be construed without reference to the implementing legislation.

This argument fails because it is immaterial whether the implementing legislation repeats the contents of the treaty or incorporates those contents by reference. In either case, a court must construe the implementing legislation. *See* 1 Restatement

(Third) of Foreign Relations Law of the United States § 111, cmt. h (1987) ("[I]t is the implementing legislation, rather than the [non-self-executing] agreement itself, that is given effect as law in the United States. *That is true even when a non-self-executing agreement is 'enacted' by, or incorporated in, implementing legislation.*") (emphasis added); *Hopson v. Kreps*, 622 F.2d 1375, 1380 (9th Cir. 1980) ("The issue in any legal action concerning a statute implementing a treaty is the intended meaning of the terms of the statute"); *Fund for Animals, Inc. v. Kempthorne*, 472 F.3d 872, 879 (D.C. Cir. 2006) (Kavanaugh, J., concurring) (quoting 1 Restatement (Third) of Foreign Relations Law § 111, cmt. h).

The United States bases its contrary position on the view of a law professor. U.S. Br. 12 (citing Louis Henkin, *Foreign Affairs and the United States Constitution* 200 n.* (2d ed. 1996)). Even if the professor's view could be treated as law, it is unclear whether he holds the view that the United States attributes to him. Professor Henkin also stated, consistent with the Restatement, that "if a treaty is not self-executing it is not the treaty but the implementing legislation that is effectively 'law of the land.'" Henkin, *Foreign Affairs and the United States Constitution* at 200 n.*.

b. According to the United States, the Convention is intended "to establish an exclusive scheme for the enforceability of arbitration provisions" (U.S. Br. 11-12), and federal law must be interpreted to give full effect to that purpose. But the Convention did not establish an "exclusive scheme," and courts cannot ignore the plain

language of the McCarran-Ferguson Act in order to give effect to the purpose of the Convention.

Rather than insisting on an "exclusive scheme," Article XI of the Convention expressly contemplates that the Convention's provisions need not trump state or local law in countries with federal systems (like the United States). 21 U.S.T. at 2521; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n.21 (1985) (The Convention "contemplates exceptions to arbitrability grounded in domestic law."). As this Court explained, "Congress may specify categories of claims that it wishes to reserve for decision by our own courts without contravening this Nation's obligations under the convention." *Id.*

Regardless of whether the Convention intended to establish an "exclusive scheme," the relevant question is whether Congress has enacted such a scheme. In arguing that Congress has done so, the United States focuses solely on the Convention and ignores the plain language of the McCarran-Ferguson Act. That statute provides that "[n]o act of Congress" shall preempt "any law enacted by any State for the purpose of regulating the business of insurance," unless the Act of Congress "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). This Court should reject the United States' attempt to elevate the purpose of one federal law over the plain meaning of another. Because Chapter 2 of the FAA is an "Act of Congress" that does not relate to insurance, it does not preempt state insurance laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

LOUISIANA SAFETY ASSOCIATION OF TIMBERMEN – SELF INSURERS FUND,

Petitioner,

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Faced with a clear circuit conflict on an important federal issue, Respondents offer a grab-bag of reasons why this Court should not resolve the conflict in a case where both sides of the issue are set forth in fully reasoned majority and dissenting opinions of an *en banc* court of appeals. Respondents' arguments are flawed and unpersuasive.

First, Respondents assert (Opp. 6-14) that there is no actual conflict between the decision below and the Second Circuit's decision in *Stephens v. American International Insurance Co.*, 66 F.3d 41 (2d Cir. 1995). No matter how Respondents try to re-frame the issue, those decisions are fundamentally incompatible. The *en banc* majority acknowledged the conflict (App. 34a), and the dissent criticized the majority opinion for "leav[ing] the state of the law in [Supremacy] Clause purgatory" (App. 84a). *Second*, Respondents' contention (Opp. 15-19) that concerns about waiver could interfere with this Court's determination of the question presented is incorrect and ignores the serious impediments to appellate review of this issue that make this case a particularly appropriate vehicle. *Finally*, Respondents' contention (Opp. 20-35) that review is not warranted because the decision below is correct is belied by the convoluted nature of the *en banc* majority's statutory interpretation, and is a merits

argument that should not affect whether certiorari is granted.[1]

1. Respondents assert (Opp. 6-9) that there is no conflict between the decision below and the Second Circuit's decision in *Stephens* because the Second Circuit "did not address the ground on which the Fifth Circuit *en banc* majority relied" – that the implementing legislation for the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention") "directs courts to apply the treaty as a treaty and does not thereby convert the treaty to an Act of Congress." Opp. 6-7. The possibility that the Second Circuit might have considered an additional argument does not in any way change the facts that the Second Circuit squarely addressed the question presented and held that the Convention is subject to the McCarran-Ferguson Act's anti-preemption provision. *See* 15 U.S.C. § 1012(b).

The Second Circuit reached this conclusion because it concluded that the Convention had no effect as a matter of domestic law apart from Chapter 2 of the Federal Arbitration Act ("FAA"), which is undoubtedly an "Act of Congress." *Stephens*, 66 F.3d at 45. In contrast, the Fifth Circuit recognized that the Convention had no domestic effect without Chapter 2 of the FAA (App. 35a), but concluded that Congress could not have intended to bring implemented treaties within the McCarran-Ferguson Act's anti-preemption provision

[1] Pursuant to Rule 29.6, Petitioner states that the corporate disclosure statement in its Petition (Pet. ii) remains current.

(App. 15a-18a, 27a-30a). The result is that foreign insurers selling policies covering local risks within the United States can circumvent state insurance laws designed to protect policyholders in the Fifth Circuit, but not in the Second Circuit. The existing conflict could not be more clear.

Respondents' additional contention (Opp. 9-11) that there is an intra-circuit conflict in the Second Circuit is specious. Neither of the Second Circuit decisions that Respondents identify conflicts with *Stephens*.

Stephens v. National Distillers & Chemical Corp., 69 F.3d 1226 (2d Cir. 1995), held that a different statute – the Foreign Soveriegn Immunities Act ("FSIA") – is not subject to the McCarran-Ferguson Act's anti-preemption provision, and that foreign insurers who were entitled to sovereign immunity were therefore excused from posting security to pay for any potential judgment. *Id.* at 1228. The court based its holding in *National Distillers* on the fact that, unlike the Convention, the FSIA itself "provid[es] the exclusive means for suing a foreign state" and "preempt[s] all other [federal] laws purporting to set forth rules for suits against foreign sovereigns." *Id.* at 1232. The FSIA therefore "clearly intends to displace all state laws to the contrary," *id.* at 1233, which satisfies the McCarran-Ferguson Act's clear statement rule. *See U.S. Dep't of the Treasury v. Fabe*, 508 U.S. 491, 507 (1993).

The court alternatively held that because the FSIA simply codified federal common law immunity doctrine, it was really pre-existing federal common law, not an "act of Congress," that superseded the state's insurance law. 69 F.3d at 1234; *see also*

Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983) ("[FSIA] codifies, as a matter of federal law, the restrictive theory of sovereign immunity."). No such unique circumstances exist here.

The Second Circuit's decision in *Smith/Enron Cogeneration Limited Partnership, Inc. v. Smith Cogeneration International, Inc.*, 198 F.3d 88, 96 (2d Cir. 1999) (*see* Opp. 11 n.3), is similarly inapposite. The court in that case held that federal law controlled the question of whether an arbitration agreement is enforceable in a case involving Chapter 2 of the FAA. But that case had nothing to do with the McCarran-Ferguson Act, which expressly places state laws above contrary federal laws when they relate to insurance. *See* 15 U.S.C. § 1012(b).

Finally, Respondents' argument (Opp. 12-14) that the conflict should not be resolved because the Second Circuit's decision in *Stephens* predates this Court's decision in *Medellin v. Texas*, 552 U.S. 491 (2008), does not withstand scrutiny. The Court in *Medellin* recognized that the Convention was not meant to "ha[ve] automatic domestic effect as federal law upon ratification," because it *expressly identified the Convention as an example of a non-self-executing treaty*. *Id.* at 491, 505 n.2. That conclusion finds clear support in the contemporaneous statements of the President and Congress on the treaty's domestic effect, which *Medellin* said are "entitled to great weight." *Id.* at 513. President Johnson stated unambiguously when he submitted the Convention to the Senate for ratification that the United States would not become a party to the Convention until Congress amended the FAA, and that the United

States' instrument of accession to the Convention "[would] be executed only after the necessary legislation is enacted." 114 Cong. Rec. S10488 (1968). Thus, by the time the treaty was enacted, its requirements already existed under domestic law in the form of an "act of Congress," which contained no clear statement that it was meant to apply to the business of insurance.

2. Respondents argue (Opp. 15-16) that this Court's resolution of the case could be complicated by a concern that *they* waived an argument in the court of appeals that the Convention is self-executing. This concern is unfounded. Respondents dispute that they waived the self-execution issue (Opp. 15, 32-35), and any concern about waiver in the concurring and dissenting opinions below (App. 39a-40a n.2, 81a-83a n.31) is limited to whether Respondents failed to argue that the Convention was self-executing in their *en banc* briefs, despite having made the argument to the panel. Respondents have identified no barrier to this Court considering arguments about self-execution, which is tied to the issue of whether the Convention is an "Act of Congress." *See O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 783 n.14 (1980) (stating that party may argue "any ground urged in th[e] court [of appeals]"); *Ryerson v. United States*, 312 U.S. 405, 408 (1941) (stating that respondent "is free to [defend the judgment below] upon any legal ground which will support it").

Respondents assert (Opp. 17-19) that the issue will continue to be decided by appellate courts in future cases. But this is not a reason to deny certiorari in a case that creates a circuit split and is

presented to the Court through carefully considered majority and dissenting opinions of an *en banc* court of appeals. In any event, the creativity Respondents must use to manufacture scenarios in which a better case might arise only serves to highlight the limitions imposed on appellate review in cases involving this preemption issue.

Respondents' assertion that the issue could be reviewed after arbitration is complete on appeal from a final judgment enforcing an arbitration award (Opp. 18) reinforces LSAT's argument that the procedural posture of *this case* is ideal for this Court's review. The standard under which final judgments enforcing arbitral awards are reviewed has been described as "among the narrowest [standards of review] known to law," which would counsel against meaningful review in that posture. *See Hollern v. Wachovia Sec., Inc.*, 458 F.3d 1169, 1172 (10th Cir. 2006) (quotation marks and citation omitted).

Citing 9 U.S.C. §§ 16(a)(1) and 16(c), Respondents note (Opp. 18) that if a motion to compel arbitration is denied, or if a motion to compel is granted in a "final judgment" that "leav[es] the court nothing to do but execute the judgment," *see Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 86 (2000), those decisions may also be appealed under the FAA. Although there may be some one-sided routes for *insurance companies* seeking to compel arbitration to appeal under § 16, that section was clearly meant to *preclude* appellate review of orders directing arbitration. *See* 9 U.S.C. § 16(b) (stating that apart from interlocutory appeals under 28 U.S.C. § 1292(b), "*an appeal may not be taken* from an

interlocutory order" directing, compelling, or refusing to enjoin arbitration, or from an order granting a stay in favor of arbitration) (emphasis added); *see also* David D. Siegel, *Practice Commentary* (2010), *noted in* 9 U.S.C. § 16 ("The mission of § 16 is to assure that if the district court ... determine[s] that arbitration is called for, the court system's interference with the arbitral process will terminate then and there."); *Green Tree Financial Corp.*, 531 U.S. at 86 (stating that § 16 "bars appeal of interlocutory orders favorable to arbitration").

Respondents also assert (Opp. 19) that review eventually could be had in a case where a federal court remands to state court for lack of federal question jurisdiction after concluding that the Convention is preempted by a state insurance arbitration provision.[2] Respondents theorize that the state court might then reconsider the preemption issue and, notwithstanding any applicable "law of the case" doctrine, reach the opposite conclusion, thus reinserting a federal question into the case. Respondents assert that in this scenario, the Supreme Court could grant certiorari to review the preemption issue after the state supreme court issues a final judgment on the merits. The many improbabilities in this hypothetical method of review only support LSAT's argument that where, as here, a court of appeals accepts certification under 28 U.S.C. § 1292(b) of an issue that confounded the district court and lays out the best arguments on both sides

[2] Respondents do not dispute that the remand order would be unreviewable. *See* 28 U.S.C. § 1447(d); Pet. 28-29.

of the issue, the Court should take the opportunity to grant certiorari.

Respondents also contend (Opp. 17) that the issue arises only infrequently, and that resolving the circuit split is therefore unimportant. The fact that there are not dozens of published cases readily available in searchable public databases like Lexis and Westlaw reflects only that, as LSAT has explained (Pet. 24-29), the issue typically arises in the context of nonfinal decisions on motions to compel arbitration, virtually none of which are decided in reported opinions. The vast majority of district court decisions addressing the issue cited by *both* parties are unpublished orders on nondispositive motions (*see* Pet. 25; Opp. 17), and the parties have ready access only to the unpublished interlocutory orders that appear in searchable databases.[3] In any event, Respondents do not contest the sources LSAT cites (Pet. 23-24) demonstrating that arbitration clauses in insurance contracts, often containing preprinted conditions developed by foreign-domiciled insurance companies, are being presented to policyholders with increasing frequency to evade the substantive federal policy, codified in the McCarran-Ferguson Act, of fostering local state regulation of insurance transactions.

[3] The orders issued by the magistrate judge and the district court in this case do not appear in Westlaw or Lexis, and they could only be located by a person who knew that the issue arose in this case, retrieved the district court docket, and located the relevant orders.

3. Finally, Respondents argue that review is not warranted because the Fifth Circuit's decision is "straightforward" and "follows directly from [the] statutory language" (Opp. 20-23), is supported by the "history and purpose" of the McCarran-Ferguson Act (Opp. 23-28), and will not have a widespread effect (Opp. 28-32). These are merits arguments that should not affect whether the Court grants certiorari to resolve a clear circuit split. Moreover, each of Respondents' arguments is demonstrably incorrect.

Respondents' argument that review is not warranted because the majority's decision is "straightforward" and "follows from the statutory langauge" is belied by the majority's own description of the task before it, which was "to determine if, in enacting the McCarran-Ferguson Act, Congress intended for state law to reverse-preempt federal law that has as its source an implemented non-self-executing treaty." App. 26a. The majority speculated that Congress must have intended to exclude "Acts of Congress" that implement treaties from the term "Acts of Congress" that is used in the McCarran-Ferguson Act's anti-preemption provision, and it concluded that its interpretation futhered the federal policy favoring arbitration. App. 16a-17a, 30a-33a. As the dissent noted, this "fruitless search for Congress's true intent" ultimately "supplant[ed] the plain meaning of the unambiguous term 'Act of Congress' with a strained interpretation aimed at protecting important federal policies." App. 76a. It also disparaged the competing federal policies underlying the McCarran-Ferguson Act.

Citing *American Insurers Ass'n v. Garamendi*, 539 U.S. 396 (2003), Respondents also defend the

Fifth Circuit's decision on the ground that the McCarran-Ferguson Act was only concerned with domestic commerce legislation. Opp. 26. The text of the McCarran-Ferguson Act reflects no such limitation. *See Sun Life Assurance Co. of Can. v. Manna*, 879 N.E.2d 320, 330 (Ill. 2007) (applying "plain language of the McCarran-Ferguson Act" to conclude that "alien insurers are within the ambit of the McCarran-Ferguson Act"). Moreover, the Court's decision in *Garamendi* is wholly inapplicable.

Garamendi held that California could not, based on the pretext of regulating the insurance business within California, force foreign insurers to disclose information about policies issued in Europe to foreign citizens during the Holocaust. The Court found that the state statute conflicted with executive agreements addressing reparations for Holocaust vitims that the President had negotiated with Germany. The Court found it "doubtful" that a California statute singling out policies issued six decades ago to European residents had any valid nexus to the proffered state regulatory objective of giving California consumers information about "which insurers had failed to pay insurance claims." 539 U.S. at 425-26.

The court concluded that such transparently extra-territorial legislation, in sharp contrast to the Louisiana arbitration statute, is not the type of statute that enjoys protection from federal preemption under the McCarran-Ferguson Act as a state statute that "regulat[es] the business of insurance." *Id.* at 428 (internal quotation marks and citation omitted); *see* 15 U.S.C. § 1012(b). Nor were the executive agreements in *Garemendi* "acts of

Congress" that could be subject to the McCarran-Ferguson Act's anti-preemption provision. 539 U.S. at 429.[4]

Finally, Respondents' argument (Opp. 28-32) that LSAT overstates the detrimental effect that the Fifth Circuit's decision will have on policyholders because some of the state insurance arbitration statutes LSAT identified (Pet. 21 n.6, 22 n.7) do not cover contracts between insurance companies is not a sufficient basis to deny certiorari. Sixteen states have enacted laws that prohibit arbitration clauses in some or all insurance contracts. *Id.* Respondents acknowledge (Opp. 29) that the Louisiana insurance arbitration statute covers the insurance policies at issue here.[5] Respondents collected premiums

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[4] Moreover, the Court's statement in *Garamendi* that the McCarran-Ferguson Act is "a federal statute directed to implied preemption by domestic commerce legislation" (539 U.S. at 428) does not affect this case. President Johnson and the Senate that ratified the Convention both made clear that they would not commit the United States to obligations under the treaty until "domestic commerce legislation" of the sort contemplated by the McCarran-Ferguson Act was enacted. Pet. 18-19 n.4.

[5] Respondents' attempt (Opp. 28-29) to characterize LSAT as a sophisticated insurance company, and the policies purchased by LSAT as facultative reinsurance contracts, strains credulity. LSAT is a collection of local Louisiana logging companies that self-insure the distinctly local exposure of workers' compensation liabilities. Self-insurance is not typically considered insurance, because it lacks the crucial element of risk transfer underlying any form of insurance. *See, e.g., U.S. Fid. & Guar. Ins. Co. v. Commercial Union Midwest Ins. Co.*, 430 F.3d 929, 938 (8th Cir. 2005) ("A majority of jurisdictions" hold that self-insurance is "not insurance") (quotation marks and citation omitted); *N. Ind. Pub. Serv. Co. v. Bloom*, 847 N.E.2d 175, 181 (Ind. 2006) ("self-insurance is not actually insurance at all but is the antithesis of insurance"). (...continued)

derived from a Louisiana policyholder and agreed to insure risks located in Louisiana. The Louisiana arbitration statute is designed to force insurers to handle claims of Louisiana residents in good faith by subjecting them to jury trials in local state courts if they refuse to pay covered claims.

The Fifth Circuit's decision throws into doubt the validity of these state laws in all cases in which a policyholder contracts with a foreign insurance company. The invalidation of these state laws undermines the States' important interests, which the McCarran-Ferguson Act advances even at the expense of important federal interests.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respondents' self-characterization (Opp. 28) as "surplus lines" insurers rather than "admitted" insurers is another distinction not found in the McCarran-Ferguson Act.

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(4)

No. 09-945

In the Supreme Court of the United States

LOUISIANA SAFETY ASSOCIATION OF TIMBERMEN — SELF INSURERS FUND, PETITIONER

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

The McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, provides that no "Act of Congress" shall preempt "any law enacted by any State for the purpose of regulating the business of insurance," unless the Act of Congress "specifically relates to the business of insurance." 15 U.S.C. 1012(b). The United States is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), *adopted* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, a multilateral treaty that promotes enforcement of agreements to arbitrate. Article II of the Convention governs recognition by the Contracting States of written arbitration agreements. Article II(3) directs that, at the request of a party to an arbitration agreement covered by the Convention, "[t]he court of a Contracting State * * * shall * * * refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." 21 U.S.T. 2519. Congress enacted legislation providing that the Convention "shall be enforced in United States courts in accordance with this chapter" and establishing related jurisdiction and venue rules. 9 U.S.C. 201; see 9 U.S.C. 202-208. The question presented is as follows:

Whether Article II of the Convention, as implemented by 9 U.S.C. 201-208, is an "Act of Congress" subject to the anti-preemption provision of the McCarran-Ferguson Act.

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In the Supreme Court of the United States

No. 09-945

LOUISIANA SAFETY ASSOCIATION OF TIMBERMEN—SELF-INSURERS FUND, PETITIONER

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to this Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. a. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), *adopted* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, is a multilateral treaty that governs the recognition and enforcement of arbitration agreements and of foreign arbitral judgments. Article II(1) of the Convention provides that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration" any dispute "in respect of a defined legal relationship,

whether contractual or not, concerning a subject matter capable of settlement by arbitration." 21 U.S.T. 2519. Article II(3) provides that, at the request of a party to an arbitration agreement covered by the Convention, "[t]he court of a Contracting State * * * shall * * * refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." *Ibid.* On April 24, 1968, the President transmitted the Convention to the Senate for its advice and consent. See Letter of Transmittal from President Lyndon B. Johnson to U.S. Senate, 114 Cong. Rec. 10,488. On October 4, 1968, the Senate gave its advice and consent. 21 U.S.T. 2517; see S. Exec. Rep. No. 10, 90th Cong., 2d Sess. (1968).

On July 31, 1970, Congress enacted legislation—codified as Chapter 2 of the Federal Arbitration Act (FAA), 9 U.S.C. 201-208—to implement the Convention. Pub. L. No. 91-368, 84 Stat. 692. Section 201 of the FAA provides that "[t]he Convention * * * shall be enforced in United States courts in accordance with this chapter." 9 U.S.C. 201. Section 202 provides that an arbitration agreement "arising out of a legal relationship, whether contractual or not, which is considered as commercial * * * falls under the Convention," except where the relationship is entirely between United States citizens and does not "involve[] property located abroad, envisage[] performance or enforcement abroad, or ha[ve] some other reasonable relation with one or more foreign states." 9 U.S.C. 202. Section 203 vests federal district courts with jurisdiction over actions "falling under the Convention," Section 204 specifies venue for such actions, and Section 205 provides for removal of state court actions falling under the Convention. 9 U.S.C. 203-205. Section 206 provides that "[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein

provided for" and "may also appoint arbitrators in accordance with the provisions of the agreement." 9 U.S.C. 206.

On September 30, 1970, the United States ratified the Convention, which entered into force for the United States on December 29, 1970. 21 U.S.T. 2517.

b. The McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, protects state laws regulating insurance from federal preemption. In relevant part, Section 1012(b) provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance.

15 U.S.C. 1012(b).

Congress enacted the McCarran-Ferguson Act in response to this Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). *See* Act of Mar. 9, 1945, ch. 20, 59 Stat. 33-34. Before that decision, "it had been assumed * * * that the issuance of an insurance policy was not a transaction in interstate commerce." *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 538-539 (1978). In *South-Eastern Underwriters*, however, the Court held that Congress was authorized under the Commerce Clause to regulate alleged price fixing and anti-competitive conduct by an insurance company that conducted substantial business across state lines. 322 U.S. at 552-553. The decision "provoked widespread concern that the States would no longer be able to engage in taxation and effective regulation of the insurance industry." *St. Paul Fire*, 438 U.S. at 539.

The McCarran-Ferguson Act declares that continued state regulation and taxation of the business of insurance is

in the public interest and that "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States." 15 U.S.C. 1011. Through its "anti-preemption" or "reverse-preemption" provision (15 U.S.C. 1012(b)), the McCarran-Ferguson Act also "remov[es] obstructions which might be thought to flow from [Congress's] own power * * * except as otherwise expressly provided in the Act itself or in future legislation." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429-430 (1946). Senator Ferguson, a co-sponsor of the bill, explained during the floor debate that if there were a federal law "now on the statute books relating in some way to interstate commerce, it would not apply to insurance." 91 Cong. Rec. 1487 (1945).

2. a. Petitioner is a self-insurance fund that provides workers' compensation coverage for its members. Petitioner entered into reinsurance agreements with respondent Certain Underwriters at Lloyd's, London (Underwriters), under which Underwriters provides coverage for workers' compensation claims that exceed petitioner's self-insurance retention. Those agreements contain a mandatory arbitration clause. Pet. App. 3a.

Petitioner allegedly assigned its rights under the reinsurance agreements to Safety National Casualty Corporation (Safety National), which is also a respondent in this Court. Underwriters refused to recognize the assignment. Pet. App. 3a.

b. Safety National sued Underwriters in federal district court, seeking reimbursement for excess workers' compensation claims. Pet. App. 3a, 122a. The district court initially granted Underwriters' motion to compel arbitration, but the court subsequently quashed arbitration on petitioner's motion after petitioner intervened in the suit. *Id.* at 3a-4a, 114a-120a. The court held that agreements to

arbitrate insurance disputes are unenforceable under Louisiana law. See *id.* at 4a, 116a. The court further held that, under the McCarran-Ferguson Act, the Louisiana unenforceability rule was not preempted by the applicable federal law (*i.e.*, the Convention as implemented by Chapter 2 of the FAA). See *id.* at 4a, 118a-119a.

c. On interlocutory appeal, a panel of the court of appeals reversed, holding that the McCarran-Ferguson Act does not bar application of the Convention as implemented to enforce the arbitration provisions of the insurance policies. Pet. App. 85a-108a. The panel declined to decide whether the Convention is self-executing. See *id.* at 93a-96a. The panel instead reasoned that the Convention had been implemented by Congress and that Congress did not intend for implemented treaties to be included "within the scope of an 'Act of Congress' when it used those words in the McCarran-Ferguson Act." *Id.* at 92a.

d. On rehearing en banc, the court of appeals (by a 15-3 vote) again held that the McCarran-Ferguson Act did not bar application of the Convention as implemented, and it therefore vacated the district court's order denying the motion to compel arbitration. Pet. App. 1a-84a.

The en banc court of appeals explained that Louisiana law had been interpreted to bar enforcement of arbitration provisions in insurance contracts, Pet. App. 7a & n.11, and the court "assume[d], without deciding," that the Louisiana statute "regulates the business of insurance within the meaning of the McCarran-Ferguson Act," *id.* at 10a. The court noted the parties' agreement that the McCarran-Ferguson Act would not save a state-law arbitration ban from preemption if the Convention is self-executing, since the Convention itself is not an "Act of Congress." See *id.* at 13a. The court declined, however, to decide whether the

Convention is self-executing, see *id.* at 12a-15a, finding the answer to that question "unclear," *id.* at 13a.

Rather than resolving that issue, the en banc court of appeals held that, even assuming *arguendo* that the Convention is not self-executing, the term "Act of Congress" in the McCarran-Ferguson Act does not encompass a non-self-executing treaty implemented by federal legislation. Pet. App. 15a-18a. The court further concluded that it is the Convention rather than the implementing legislation that is being "construed to invalidate, impair, or supersede" state law. *Id.* at 19a-22a. The court explained that Chapter 2 of the FAA contains multiple references to the Convention and directs United States courts to enforce it. See *ibid.* The court also observed that its conclusion was bolstered by the "congressionally sanctioned national policy favoring arbitration of international commercial agreements." *Id.* at 31a.

Judge Clement concurred in the judgment. She would have held that Article II of the Convention is self-executing and therefore preempts state law by virtue of the Supremacy Clause. Pet. App. 38a-49a.

Judge Elrod, joined by Judges Smith and Garza, dissented. Pet. App. 50a-84a. The dissenting judges took it as given that the Convention is not self-executing because they viewed the parties as not disputing that proposition. See *id.* at 50a & n.1, 81a & n.31. They would have held that the only relevant source of domestic federal law in this case is Chapter 2 of the FAA, see *id.* at 70a-71a; that this implementing legislation is an "Act of Congress" within the meaning of the McCarran-Ferguson Act, see *id.* at 75a-76a; and that the legislation "is therefore reverse-preempted by the Louisiana statute by operation of the McCarran-Ferguson Act," *id.* at 83a.

DISCUSSION

The court of appeals reached the correct result in this case. Pursuant to the Convention as implemented, arbitration agreements pertaining to international commercial transactions are enforceable in United States courts notwithstanding any contrary provision of state law. The court of appeals did not decide the threshold question whether Article II of the Convention is self-executing. The better view of the matter, however, is that Article II *is* self-executing, and all parties agree that the McCarran-Ferguson Act does not apply to self-executing treaties.

Even if Article II were not self-executing, the McCarran-Ferguson Act would not bar its application. The Convention's implementing legislation does not impose substantive rules of decision, but rather directs United States courts to enforce the Convention itself. As implemented by Chapter 2 of the FAA, moreover, the Convention establishes an exclusive scheme specifying the circumstances under which domestic courts must enforce arbitration provisions in international commercial agreements. Neither the Convention nor the implementing legislation excepts insurance contracts from its coverage, and the federal regime would be disrupted if a state-law arbitration ban were allowed to have that effect.

In addition to the fact that the judgment below is correct, other factors counsel against further review. First, the decision below does not create a significant conflict among the courts of appeals that warrants this Court's intervention. Second, it is not clear that the relevant Louisiana statute actually precludes enforceability of the arbitrations agreements in this case. Third, recent federal legislation likely diminishes the prospective importance of the question presented.

A. The Judgment Of The Court Of Appeals Is Correct

1. The parties correctly agree that if Article II of the Convention is self-executing, the McCarran-Ferguson Act would not bar its application (because the Convention is not an "Act of Congress"), and Article II would preempt any contrary state law. Pet. App. 13a; Pet. 19-20; Br. in Opp. 35. In the government's view, Article II of the Convention is self-executing. That conclusion, endorsed by Judge Clement (the only judge below to decide the issue, see Pet. App. 38a-49a), provides an independent basis for the court of appeals' judgment.

In *Medellín* v. *Texas*, 128 S. Ct. 1346 (2008), this Court noted the longstanding distinction between a self-executing treaty, which upon entry into force "automatically constitute[s] binding federal law enforceable in United States courts," and a non-self-executing treaty, which does not. *Id.* at 1356. In determining whether a treaty provision is self-executing, the Court has focused on the intent of the U.S. treatymakers as evidenced by the treaty's text. *Id.* at 1357, 1364. The Court has also considered the negotiation and drafting history, as well as the post-ratification understanding of signatory nations (including the views of the Executive Branch). *Id.* at 1357, 1361.

The text of Article II of the Convention strongly supports the conclusion that Article II is self-executing. Article II(3) requires that the "*court* of a Contracting State, when seized of an action in a matter with respect of which the parties have made an agreement within the meaning of this article, *shall*, at the request of one of the parties, refer the parties to arbitration." 21 U.S.T. 2519 (emphases added). In *Medellín*, the Court noted the relevance of language mandating compliance, specifically terms such as "shall" or "must," especially when those terms constitute "a directive to domestic courts." 128 S. Ct. at 1358. Those are

precisely the elements present in Article II(3). Both the mandatory nature of Article II(3)'s text, and its direction to the "court[s]" (rather than to the governments) of the contracting States, suggest that the provision was intended to be immediately enforceable in domestic courts.

Relatedly, neither Article II(3) nor Article II(1)—which provides that "[e]ach Contracting State *shall* recognize an agreement in writing under which the parties undertake to submit to arbitration," 21 U.S.T. 2519 (emphasis added)—appears to envisage that steps beyond ratification are necessary before the Convention creates binding obligations enforceable in domestic courts. The language in those provisions stands in stark contrast to that in the treaty provision at issue in *Medellín*—"each Member of the United Nations *undertakes to comply* with the decision of the International Court of Justice," Charter of the United Nations, June 26, 1945, Art. 94(1), 59 Stat. 1051 (emphasis added)—which the Court determined did "not contemplate * * * automatic enforceability." *Medellín*, 128 S. Ct. at 1358-1359; see, *e.g.*, *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (distinguishing between treaty language that "act[s] directly on" property rights and language reflecting a commitment to enact legislation to modify those rights).

In arguing that the Convention is not self-executing, petitioner relies principally on this Court's generic citation in *Medellín* to the legislation implementing the Convention as evidence that "Congress is up to the task of implementing non-self-executing treaties." Pet. 18 n.4 (quoting 128 S. Ct. at 1366). The Court's passing reference to the implementing legislation cannot bear the weight that petitioner would give it. The dispute in *Medellín* concerned the enforceability in domestic courts of a judgment of the International Court of Justice, see 128 S. Ct. at 1353, and the citation on which petitioner relies immediately follows the

Court's statement that "[t]he judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress," *id.* at 1366. That statement implicates only Article III of the Convention, which establishes the binding nature and enforceability of foreign arbitral awards. 21 U.S.T. 2519. Even as to Article III, the *Medellín* Court's statement was dictum, since no part of the Convention was actually at issue in that case. And unlike Article II(3), Article III is not framed as a directive to the "court[s]" of the contracting States. See *ibid.* It is well established that some provisions of a treaty can be self-executing even if others are not. See 1 Restatement (Third) of Foreign Relations Law of the United States § 111, cmt. h (1987). The *Medellín* dictum therefore provides no meaningful guidance on the question whether Article II of the Convention is self-executing.

Petitioner also relies on the fact that, in submitting the Convention to the Senate for its consent, the President stated that legislative changes would be "required before the United States becomes a party to the Convention." Pet. 19 n.4 (quoting 114 Cong. Rec. 10,488 (1968)). The Legal Adviser's testimony before the Senate Foreign Relations Committee put that statement into context: "The Department of Justice * * * has suggested that implementing legislation * * * is desirable * * * to insure the coverage of the act extends to all cases arising under the treaty and * * * to take care of related venue and jurisdictional requirement problems." S. Exec. Rep. No. 10, 90th Cong., 2d Sess. 5-6. Consistent with that explanation of the purposes the implementing legislation would serve, Chapter 2 of the FAA vests the federal district courts with jurisdiction over actions falling under the Convention, 9 U.S.C. 203; specifies the proper venue for such actions, 9 U.S.C. 204; and authorizes removal of cases from state to federal court, 9 U.S.C.

205. The legislation on those subjects does not establish substantive rules of decision but merely facilitates implementation of the Convention, and is consistent with the conclusion that provisions of the Convention are self-executing. Furthermore, enactment of such legislation is consistent with the approach taken in the context of certain tax and extradition treaties that are self-executing but nevertheless are accompanied by implementing legislation to facilitate their enforcement.[1] Accordingly, the fact that domestic legislation may have been necessary to clarify jurisdiction- and venue-related issues pertaining to the implementation of the Convention does not contradict the conclusion that Article II is self-executing.

To the extent the Court finds the Convention's status ambiguous, it should defer to the State Department's view —as articulated in this brief—that Article II is self-executing. See, *e.g.*, *Medellín*, 128 S. Ct. at 1361 (citing Brief for United States as Amicus Curiae for Executive Branch's view of treaty status); *Abbott* v. *Abbott*, 130 S. Ct. 1983, 1993 (2010) (Executive Branch's interpretation of treaty entitled to "great weight").

2. Even if (as the court of appeals assumed) Article II of the Convention were not self-executing, the Convention as implemented would preempt any contrary state law, including a state law barring enforcement of agreements to arbitrate insurance disputes. That is so for two reasons. First, Chapter 2 of the FAA does not establish substantive rules of decision that courts are bound to apply; rather, it directs courts to enforce the Convention itself. Second, the

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[1] See S. Exec. Rep. No. 12, 110th Cong., 2d Sess. 7 (2008) (noting in relation to 28 extradition treaties that the "legal procedures for extradition are governed by both federal statute and self-executing treaties. Subject to a contrary treaty provision, existing federal law implements aspects of these treaties. *See* 18 U.S.C. §§ 3181 to 3196.").

Convention and its implementing legislation were intended to establish an exclusive scheme for the enforceability of arbitration provisions in international commercial agreements.

a. The implementing legislation provides that "[t]he Convention * * * shall be enforced in United States courts in accordance with this chapter," 9 U.S.C. 201, and it vests federal district courts with jurisdiction over "[a]n action or proceeding falling under the Convention," 9 U.S.C. 203. It further provides that Chapter 1 of the FAA applies to actions and proceedings under Chapter 2 (which codified the Convention) to the extent that Chapter 1 "is not in conflict with this chapter *or the Convention as ratified by the United States*." 9 U.S.C. 208 (emphasis added). The italicized language indicates that the Convention itself may sometimes supersede Chapter 1 of the FAA even if the superseded Chapter 1 provision does not conflict with any part of Chapter 2. The clear import of those provisions is that, within the parameters and pursuant to the procedures established by Chapter 2 of the FAA, federal courts will interpret and enforce the Convention itself, not simply the statute that Congress enacted to implement it. Cf. Louis Henkin, *Foreign Affairs and the United States Constitution* 200 n.* (2d ed. 1996) (explaining that in certain circumstances the effect of the implementing legislation is to "give[] the treaty itself legal effect"); Pet. App. 24a-25a n.53.[2]

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[2] In that respect, Chapter 2 of the FAA is quite different from a hypothetical Act of Congress that directed federal courts to enforce arbitration clauses and to enforce foreign arbitral awards, but that made no express reference to the Convention itself. Such a statute might "implement" the Convention, in the sense of facilitating compliance with the United States' treaty obligations, but it would not support the view

The McCarran-Ferguson Act comes into play only when an "Act of Congress" is "construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." 15 U.S.C. 1012(b). Because a treaty is not an "Act of Congress," the McCarran-Ferguson Act does not save state insurance regulation from the preemptive effect of a treaty provision that is enforceable in United States courts. That is so even if the judicially-enforceable character of the relevant treaty provision depends on the antecedent enactment of an implementing statute. Thus, even if legislation were necessary to make Article II of the Convention binding upon United States courts, Congress has enacted such legislation, and Article II accordingly supersedes contrary state law, including state insurance regulation.

b. It is a well-established canon of construction that a statute should be interpreted, whenever possible, to comply with international law. See *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."). The McCarran-Ferguson Act contains no evidence that, in protecting against "implied preemption by domestic commerce legislation" of state regulation of insurance, Congress intended to interfere with the Executive's ability to enter into and comply with international agreements—let alone those governing foreign commerce. *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 428 (2003) (noting McCarran-Ferguson Act was intended to address domestic commerce). To the contrary, the Act was not intended "to clothe the States with any power to regulate or tax the busi-

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that the Convention itself is directly enforceable by United States courts.

ness of insurance beyond that which they had been held to possess" prior to *South-Eastern Underwriters*. H.R. Rep. No. 143, 79th Cong., 1st Sess. 3 (1945); see *Maryland Cas. Co.* v. *Cushing*, 347 U.S. 409, 412-413 (1954) (concluding that the McCarran-Ferguson Act did not protect state law from preemption by a provision of federal admiralty law) (plurality opinion).

When the United States deposited its instrument of ratification for the Convention, it declared that it would apply the treaty "only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States." 21 U.S.T. 2566. Chapter 2 of the FAA confirms that limitation, see 9 U.S.C. 202, and further provides that "[a]n agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states," *ibid.* The Convention was thus understood to regulate an area—foreign commerce—which is "preeminently a matter of national concern." *Japan Line, Ltd.* v. *County of L.A.*, 441 U.S. 434, 448 (1979); see also, *e.g.*, *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285-286 (1976) (describing "the Federal Government's exclusive regulation of foreign commerce"). Thus, not only does Chapter 2 arguably preempt contrary state law, but reading the earlier-enacted McCarran-Ferguson Act as authorizing the several States to limit the enforceability of international arbitration agreements pursuant to Article II of the Convention would undermine the careful efforts of Congress and the Executive to clarify the United States' understanding of the Convention's scope.

In addition, application of state law to preclude arbitration of insurance-related disputes could be construed as impacting the United States' treaty obligations. In *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 538-539 (1995), this Court instructed courts to "be most cautious before interpreting * * * domestic legislation in such manner as to violate" the Convention, and it rejected an interpretation of the Carriage of Goods by Sea Act, ch. 229, 49 Stat. 1207, that would have barred enforcement of an arbitration provision in an international commercial agreement. The courts of appeals have likewise recognized that the "United States obligated itself [in the Convention] to enforce arbitration agreements between foreign and domestic contracting parties," and that "[a]ny law or decision prior in time to this express undertaking must be construed as consistent with the Convention or set aside by it." *Sedco, Inc.* v. *Petroleos Mexicanos Mexican Nat'l Oil Co.*, 767 F.2d 1140, 1148 (5th Cir. 1985); see *Bautista* v. *Star Cruises*, 396 F.3d 1289, 1297 (11th Cir.), cert. dismissed, 545 U.S. 1136 (2005).

The courts of appeals also have rejected application of the McCarran-Ferguson Act to "reverse preempt" other federal laws in contexts in which such reverse preemption would be inconsistent with comprehensive federal law or policy. The Second Circuit, for example, has held that the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*—neither of which specifically relates to the business of insurance or expressly preempts state insurance laws –are not subject to reverse preemption under the McCarran-Ferguson Act. See *Stephens* v. *National Distillers & Chem. Corp.*, 69 F.3d 1226, 1230-1234 (2d Cir. 1996) (FSIA); *Spirt* v. *Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1065-1066 (2d Cir. 1982) (Title VII),

reinstated as modified by 735 F.2d 23, cert. denied, 469 U.S. 881 (1984). Other courts have reached the same result with respect to other federal statutes. See, *e.g.*, *Dudek* v. *Prudential Sec., Inc.*, 295 F.3d 875, 878 (8th Cir. 2002) (holding that the McCarran-Ferguson Act does not preclude application of federal law barring certain state-law challenges relating to purchase or sale of covered securities) (following *Lander* v. *Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 120 (2d Cir. 2001)); *Patenaude* v. *Equitable Life Assurance Soc'y of the United States*, 290 F.3d 1020, 1026-1028 (9th Cir. 2002) (same); cf. *Humana Inc.* v. *Forsyth*, 525 U.S. 299, 308 (1999) (rejecting contention that "Congress intended to cede the field of insurance regulation to the States, saving only instances in which Congress expressly orders otherwise").

The foregoing principles reinforce the conclusion that the McCarran-Ferguson Act does not authorize States to preclude enforcement of arbitration agreements encompassed by the Convention and Chapter 2 of the FAA. The Convention was intended "to unify the standards by which agreements to arbitrate are observed." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). The strong federal policy in favor of enforcing arbitration agreements under uniform standards "applies with special force in the field of international commerce," where "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" are implicated. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629, 631 (1985); see *Scherk*, 417 U.S. at 516 (describing international agreement to arbitrate as "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction").

The Court in *Mitsubishi* recognized that Article II(1) of the Convention "contemplates exceptions to arbitrability grounded in domestic law," and that "Congress may specify categories of claims it wishes to reserve for decision by our own courts without contravening this Nation's obligations under the Convention." 473 U.S. at 639 n.21. The Court "decline[d]," however, "to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions where Congress has not expressly directed the courts to do so." *Ibid.* Because the McCarran-Ferguson Act predates the Convention and does not specifically address arbitration, and because application of the Act in the manner that petitioner advocates would subvert federal efforts to deal comprehensively and uniformly with enforcement of arbitration agreements in the international commercial context, the Act is inapplicable here.

B. This Case Does Not Warrant Further Review

In addition to the fact that the judgment below is correct, other factors counsel against this Court's review.

1. The limited (1-1) circuit conflict alleged by petitioner (Pet. 15-17) is not sufficiently developed to warrant resolution by this Court. In *Stephens* v. *American Int'l Insurance Co.*, 66 F.3d 41 (1995), the only court of appeals decision alleged to conflict with the decision below, the Second Circuit held that the Convention is not self-executing, and that the McCarran-Ferguson Act saved from preemption a state law that precluded enforcement of an arbitration agreement in an insurance contract. *Id.* at 45. The Second Circuit offered only a cursory analysis of the Convention's preemptive effect, however, and the court might reconsider its conclusion in light of the government's view, as expressed in this brief, that Article II of the Convention *is* self-executing and preempts contrary state law. See p. 11,

supra; cf. *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) ("A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute.").

In addition, the Second Circuit's subsequent decision in *Stephens* v. *National Distillers & Chemical Corp.*, *supra*, calls into question the continuing vitality of the prior *Stephens* decision. The Second Circuit ruled in the latter decision that, notwithstanding the McCarran-Ferguson Act, the FSIA's restrictions on attachment of foreign states' property superseded New York's requirement that out-of-state insurers post security in specified circumstances. See 69 F.3d at 1228, 1230-1231. Although the FSIA (like the Convention) does not "specifically relate to the business of insurance" or expressly preempt state insurance laws, the Second Circuit reasoned that courts must apply "federal law to the insurance industry, in spite of the McCarran-Ferguson Act, whenever federal law clearly intends to displace all state laws to the contrary." *Id.* at 1231, 1233. At the very least, the intra-circuit tension between the two *Stephens* decisions should be resolved by the Second Circuit before this Court intervenes.

2. Notwithstanding the court of appeals' assumption (Pet. App. 7a), it is not clear whether Louisiana law actually prohibits enforcement of the parties' agreement to arbitrate in this case. The relevant statute provides: "No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state * * * shall contain any condition, stipulation, or agreement * * * [d]epriving the courts of this state of the jurisdiction of action against the insurer." La. Rev. Stat. Ann. § 22:868(A)(2). Although Louisiana inter-

mediate appellate courts have held that the statute bars enforcement of an arbitration provision in state court, see *Hobbs* v. *IGF Ins. Co.*, 834 So. 2d 1069, 1071 (La. Ct. App. 2002); *Macaluso* v. *Watson*, 171 So. 2d 755, 757-758 (La. Ct. App. 1965); *Spillman* v. *United States Fid. & Guar. Co.*, 179 So. 2d 454, 455 (La. Ct. App. 1965), and the Louisiana Supreme Court and the Fifth Circuit have noted those holdings in dictum, see *Doucet* v. *Dental Health Plans Mgmt. Corp.*, 412 So. 2d 1383, 1384 (La. 1982); *McDermott Int'l, Inc.* v. *Lloyds Underwriters*, 120 F.3d 583, 586-588 (5th Cir. 1997), it is not clear that the Louisiana Supreme Court would accept that interpretation if presented with the question today. The Louisiana Supreme Court has recognized that the positive law of Louisiana favors arbitration, *Aguillard* v. *Auction Mgmt. Corp.*, 908 So. 2d 1, 7, 18 (La. 2005), and this Court has rejected the traditional view that a forum selection clause or arbitration agreement divests a court of jurisdiction. See *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 12-13 (1972); *Scherk*, 417 U.S. at 516-518; see also *DiMercurio* v. *Sphere Drake Ins., PLC*, 202 F.3d 71, 74-79 (1st Cir. 2000).

The applicability of La. Rev. Stat. Ann. § 22:868(A)(2) is particularly uncertain in the circumstances of this case. By its terms, that statute applies only to contractual provisions that would "[d]epriv[e] the courts of this state of the jurisdiction of an action against the insurer." This suit, however, was filed in federal district court, Pet. App. 3a, and the district court held that the case remained within its jurisdiction even after the court granted petitioner's motion to quash arbitration, see *id.* at 110a. Because the choice in this case appears to be between referral of the dispute to arbitration and litigation of the case in federal court, it is unclear how enforcement of the parties' arbitration agreement in accordance with the en banc court of appeals' deci-

sion could have the effect of "[d]epriving the courts of [Louisiana]" of jurisdiction over the case. See Resp. C.A. (en banc) Br. 41-43 & n.15.[3]

3. The issue presented in this case is likely to arise less frequently in the future in light of a provision in the recently enacted Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376. Section 531(b)(1) of that Act, which regulates reinsurance contracts, states that "laws, regulations, provisions, or other actions of a State that is not the domiciliary State of the ceding insurer * * * are preempted to the extent that they * * * restrict or eliminate the rights of the ceding insurer or the assuming insurer to resolve disputes pursuant to contractual arbitration to the extent such contractual provision is not inconsistent with the provisions of [the FAA]." 124 Stat. 1595. In other words, Section 531(b)(1) expressly preempts state law, except the law of the State in which the ceding insurer (*i.e.*, the entity that sought reinsurance) is domiciled, to the extent that state law restricts or eliminates the resolution of reinsurance disputes through arbitration. Therefore, in cases in which Section 531(b)(1) applies, a party seeking to enforce an arbitration clause need not rely on Article II of the Convention.

It is unclear whether Section 531(b)(1) affects the resolution of this particular case, both because the identity of

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[3] If this Court concludes that the federal question presented in the petition for a writ of certiorari otherwise warrants the Court's review, the Court may wish to certify to the Louisiana Supreme Court the antecedent question whether enforcement of the parties' agreement to arbitrate is prohibited by La. Rev. Stat. Ann. § 22:868. See La. Sup. Ct. R. 12 (providing for certification of state-law questions by this Court to the Louisiana Supreme Court where the state-law issue is "determinative of" the case and "there are no clear controlling precedents in the decisions of the supreme court" of Louisiana); cf. *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 75-77 (1997).

the "ceding insurer" is uncertain (petitioner is alleged to be domiciled in Louisiana but Safety National, the assignee, is not) and because this suit was filed before Section 531(b)(1) was enacted. Going forward, however, the statute presumably will reduce the number of cases in which the question presented arises. Accordingly, this Court's review of the issue, which will diminish in significance, is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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